

No. 84-710-CFX Title: Equal Employment Opportunity Commission, Petitioner
Status: GRANTED v.
 Mayor and City Council of Baltimore, et al.

Docketed: Court: United States Court of Appeals
November 2, 1984 for the Fourth Circuit

Vide: Counsel for petitioner: Solicitor General
84-518 Counsel for respondent: Engelman, William H.

Entry	Date	Note	Proceedings and Orders
1	Sep 17 1984		Application for extension of time to file petition and order granting same until November 26, 1984 (Chief Justice, September 20, 1984).
2	Nov 2 1984	G	Petition for writ of certiorari filed.
3	Dec 3 1984		Brief of respondents Mayor & City Council of Baltimore in opposition filed. VIDE.
4	Dec 5 1984		DISTRIBUTED. January 4, 1985
6	Jan 7 1985		REDISTRIBUTED. January 11, 1985
8	Jan 14 1985		Petition GRANTED. This case is consolidated with case No. 84-518, and a total of one hour is allotted for oral argument. Justice Powell OUT. *****
9	Feb 22 1985		Record filed.
10	Feb 22 1985		Certified original record & C.A. proceedings, 15 volumes, received. (Box).
11	Feb 28 1985		Brief of petitioners Robert W. Johnson, et al. filed. VIDE.
12	Feb 28 1985		Joint appendix filed. VIDE.
13	Feb 28 1985		Brief amicus curiae of American Assn. of Retired Persons filed. VIDE.
14	Feb 28 1985		Brief of petitioner EEOC filed. VIDE.
15	Mar 16 1985	G	Motion of the Solicitor General for divided argument filed.
16	Mar 25 1985		Motion of the Solicitor General for divided argument GRANTED. Justice Powell OUT.
17	Mar 25 1985		SET FOR ARGUMENT. Monday, April 22, 1985. This case is consolidate with case No. 84-518. (1st case) (1 hour).
18	Apr 1 1985		Brief amicus curiae of Vermont filed. VIDE.
19	Apr 1 1985		Brief amicus curiae of New York filed. VIDE.
20	Apr 2 1985		Brief amicus curiae of Massachusetts filed. VIDE.
21	Apr 3 1985	G	Motion of National League of Cities for leave to file a brief as amicus curiae filed.
22	Apr 5 1985		CIRCULATED.
23	Apr 6 1985	X	Brief of respondent Mayor and City Council of Baltimore filed. VIDE.
24	Apr 15 1985		Motion of National League of Cities for leave to file a brief as amicus curiae GRANTED.
25	Apr 12 1985	X	Reply brief of petitioner EEOC filed. VIDE.
26	Apr 22 1985		ARGUED.

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84-710 ①

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No.

In the Supreme Court of the United States
OCTOBER TERM, 1984

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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QUESTION PRESENTED

Whether the City of Baltimore's plan requiring involuntary retirement of its firefighters at age 55 satisfies the Age Discrimination In Employment Act, 29 U.S.C. 621 *et seq.*, in the absence of a showing that age is a bona fide occupational qualification for the job, solely because 5 U.S.C. 8335(b) requires the retirement of *federal* firefighters at age 55.

PARTIES TO THE PROCEEDING

Robert W. Johnson, August T. Stern, Jr., Thomas C. Doyle, Mitchell Paris, Robert L. Robey, and James Lee Porter were plaintiffs in the trial court and are respondents here. Hyman A. Pressman, Donald D. Pomerleau, Calhoun Bond, Edward C. Heckrotte, Sr., Charles Daugherty, Paul C. Wolman, Jr. and Curt Heinfeldt are Members of the Board of Trustees of the Fire and Police Employees Retirement System of the City of Baltimore. They were defendants in the court below and have separately petitioned from the judgment below, No. 84-518.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 731 F.2d 209. The opinion of the district court (App., *infra*, 22a-53a) is reported at 515 F. Supp. 1287.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1984. A petition for rehearing was denied on June 29, 1984 (App., *infra*, 21a). On September 20, 1984, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 26, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623, provides in pertinent part:

(a) Employer Practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * * * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; seniority system employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

5 U.S.C. 8335(b) provides:

A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he

becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

STATEMENT

1. Six firefighters brought this action in the United States District Court for the District of Maryland to challenge the City of Baltimore's municipal code provisions that establish an involuntary retirement age. The plaintiffs claimed that those provisions violate the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* The Equal Employment Opportunity Commission (EEOC) subsequently intervened in support of the plaintiffs.

In 1962, the City of Baltimore established the current Fire and Police Employee Retirement System (F & PERS) (Baltimore, Md., Code art. 22, § 34 (1983)) to cover uniformed personnel who previously had been covered by the overall retirement system for all City employees. The system generally requires all firefighters below the rank of lieutenant to retire at age 55; lieutenants may work until 65. The system makes special provision for firefighters who were hired before 1962. Such firefighters below the rank of lieutenant who are presently covered by the F & PERS system may work until age 60. App., *infra*, 24a-25a. In addition, a firefighter hired before 1962 who chose to remain in the preexisting retirement program for non-uniformed employees may work until age 70 (*id.* at

32a). The plaintiffs here include both firefighters covered by the grandfather clause subject to retirement at age 60 and one firefighter hired after 1962 who is subject to retirement at age 55 (*id.* at 25a-26a).

Involuntary retirement prior to age 70 is specifically prohibited by Section 4(f)(2) of the ADEA, 29 U.S.C. 623(f)(2), but the defendants (the City) asserted as an affirmative defense that age is a bona fide occupational qualification (BFOQ) for the firefighter position within the meaning of Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1). Following a full trial at which most of the evidence focused on the validity of the BFOQ defense, the district court held that the City had failed to show that age was a BFOQ for firefighters. Applying the test developed in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976), and later adopted by the Fourth Circuit (see App., *infra*, 36a-37a), the court found that the City had not carried its burden of proving: (1) that its retirement policy was reasonably necessary to the essence of its business of operating a fire department; and (2) that there was a factual basis for believing that either all or substantially all persons over the retirement ages could not perform safely and efficiently, or that it was impossible or impractical to deal with its employees on the basis of individual ability. The district court supported this conclusion with detailed factual findings that the City's firefighters could safely and efficiently perform their jobs beyond age 60 and that the City could use a testing program to identify any individuals unable to perform adequately. *Id.* at 38a-49a.¹

¹ The court also rejected the City's contentions that application of the ADEA to it was unconstitutional (App., *infra*, 29a-31a) and that the plaintiffs had waived any future ADEA claim when they elected to be covered by the F & PERS (*id.* at 31a-34a).

2. A divided panel of the court of appeals reversed (App., *infra*, 1a-20a).² The court did not take issue with the district court's factual findings that the City had failed to prove that age was a BFOQ for firefighters,³ but the court held that the City was entitled to the BFOQ defense as a matter of law. The court of appeals stated that in *EEOC v. Wyoming*, 460 U.S. 226, 240 (1983), this Court had characterized the BFOQ exception as not overriding entirely a state's discretion to impose a mandatory retirement age, but rather merely testing that discretion "against a reasonable federal standard" (App., *infra*, 5a-6a). The court of appeals found such a federal standard in a federal civil service statute, 5 U.S.C. 8335(b), which requires federal law enforcement officers and firefighters to retire at age 55 if they have sufficient years of service to qualify for a pension and their agency does not find that it is in the public interest to continue their employment. The court of appeals held that since Congress had selected age 55 as the retirement date for most federal firefighters, it followed that Congress recognized age 55 as a BFOQ for firefighters. Hence, the court concluded, age 55 necessarily constituted a BFOQ for all state and local firefighters as well, and therefore in this case the City was not required to make any showing at trial as to the need for a mandatory retirement age of 55. App., *infra*, 6a-8a.

The court added that its statutory interpretation establishing age as a per se BFOQ for firefighters was "compelled further" by the desire to avoid "serious constitutional questions" (App., *infra*, 9a). The court identified three such questions: (1) whether Section 5 of

² The City filed a petition for certiorari before judgment, which was denied. 455 U.S. 944 (1982).

³ Indeed, the court of appeals characterized the district court's decision as a "thorough, impeccably reasoned opinion" (App., *infra*, 8a).

the Fourteenth Amendment authorized the extension of the ADEA to state and local governments (App., *infra*, 8a-10a); (2) whether the Commerce Clause authorized the application of the ADEA to Baltimore firefighters (*id.* at 11a-12a); and (3) whether judicial factfinding concerning the validity of age as a BFOQ would violate the separation of powers doctrine where "Congress has, in 5 U.S.C. § 8335(b), adopted a legislative answer" to that question (*id.* at 13a).

Chief Judge Winter dissented (App., *infra*, 16a-20a). He rejected the majority's conclusion that 5 U.S.C. 8335(b) demonstrated a congressional determination that age 55 is a BFOQ for federal firefighters, stating that the language and legislative history of that statute "belie[] the existence of congressional intent * * * to fix age fifty-five as a BFOQ" (App., *infra*, 18a). Moreover, Judge Winter stated, whether or not age 55 was established as a BFOQ for federal firefighters is irrelevant to interpreting the ADEA. He pointed out that this Court had already rejected in *EEOC v. Wyoming*, *supra*, the argument that Congress's treatment of federal civil service employees could constrict the broad requirements of the ADEA (App., *infra*, 19a-20a). Judge Winter concluded that "the fact that Congress may require some federal firefighters to retire at age fifty-five does not excuse Baltimore from providing the facts necessary to satisfy" the BFOQ defense (*id.* at 20a).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals seriously undermines effectuation of the purposes and policies of the ADEA with respect to a significant segment of public employees by frustrating Congress's intent that involuntary retirement ages prior to age 70 not be established without a specific, individualized showing of a bona fide necessity for the age requirement. The decision also leads to inconsistent interpretation of the

ADEA nationwide because it directly conflicts with decisions in other circuits. Moreover, the interpretation below is contrary to both the language and the legislative history of the statute, and, indeed, rests on a theory that has already been rejected by this Court. Accordingly, this Court should grant certiorari to restore the heretofore uniform—and correct—interpretation of the ADEA and the statutory rights of numerous public employees intended to be protected by the statute.

1. a. In *EEOC v. Wyoming*, *supra*, this Court rejected the assumption that lies at the heart of the decision below, namely, that the ADEA is to be interpreted by resort to Congress's treatment of federal civil service employees under other statutes. The Court held in *Wyoming* that the ADEA could be applied constitutionally to employment practices of state and local governments (in that case, to the job of game warden) because it did not interfere with "integral government functions." The Court explained that the ADEA did not require employers to retain unfit employees, but at most required them to make individualized judgments concerning fitness for duty. 460 U.S. at 239. The Court added that the BFOQ defense provides an adequate safeguard against impermissible federal interference, stating (*id.* at 240 (emphasis in original)):

Perhaps more important, appellees remain free under the ADEA to continue to do *precisely what they are doing now*, if they can demonstrate that age is a "bona fide occupational qualification" for the job of game warden. * * * Thus, * * * even the State's discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard.

Accordingly, the Court remanded the case, giving the State of Wyoming the opportunity to prove at trial that the age limit was a BFOQ for the job of game warden.

The court of appeals completely misunderstood the import of this Court's discussion of the BFOQ defense. This Court stated simply that the State could maintain a mandatory retirement age system if that system satisfied a "reasonable federal standard," *i.e.*, if the State demonstrated that age was a BFOQ within the meaning of Section 4(f)(1). The federal standard referred to by this Court is nothing more or less than the BFOQ standard established in the ADEA. The court of appeals, however, erroneously interpreted *Wyoming* to mean that it should search *other* federal statutes to find a BFOQ standard for individual occupations. This type of search, which in this case settled on 5 U.S.C. 8335(b), substitutes chaos for the uniform standard set forth by Congress in the ADEA. The "reasonable federal standard" to be used in applying the ADEA is that found in the ADEA itself—whether "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business" (29 U.S.C. 623(f)(1))—not in other federal statutes.

Indeed, this Court in *Wyoming* explicitly repudiated using the treatment of federal employees as a means of divining Congress's intent with respect to the ADEA. The State argued in *Wyoming* that the statutes imposing mandatory retirement on federal civil service workers, notably 5 U.S.C. 8335(b), demonstrated that there was not a sufficient federal interest in the ADEA to satisfy the constitutional standards for imposing different restrictions on state and local governments. The Court rejected that suggestion, explaining (460 U.S. at 243 n.17): "Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in that declaration * * *." In other words, the ADEA stands on its own; its terms are not to be restricted by examining other federal statutes.

Thus, as Judge Winter correctly stated in his dissent (App., *infra*, 20a), *Wyoming* completely undercuts the linchpin of the decision below, namely, the notion that a preexisting statute relating solely to federal employees alters the definition of the BFOQ defense in the ADEA itself.⁴

b. The line drawn by this Court separating the treatment of federal workers from the standards established in the ADEA is strongly supported by the legislative history of the ADEA. The decision to maintain mandatory retirement provisions for certain federal employees clearly did not reflect a congressional finding that mandatory retirement was appropriate for non-federal employees in similar occupations. Rather, retention of the statutory exemptions for these federal employees resulted from an agreement to provide the congressional committees with jurisdiction over the retirement

⁴ While the litigation in *Wyoming* did not focus on the BFOQ defense, the possibility of a BFOQ defense as a matter of law based on 5 U.S.C. 8335(b) was adverted to in questioning at oral argument in this Court (Tr. of Oral Argument 7-8, 30-32). Under the decision below, the State of Wyoming should have been entitled to a BFOQ defense as a matter of law because of 5 U.S.C. 8335(b). That Section applies not only to firefighters, but also to federal law enforcement officers. Game wardens in Wyoming are considered law enforcement officers authorized to enforce the criminal provisions of Wyoming's fish and game laws. See Wyo. Stat. § 7-2-101 (Supp. 1984); *id.* § 23-6-101 (1977). Similarly, federal game wardens are "law enforcement officers" within the meaning of 5 U.S.C. 8335(b). See 5 U.S.C. 8331(20); Letter from Warren B. Irons, Chief, Retirement Division, U.S. Civil Service Commission to J. Atwood Maulding, Director of Personnel, U.S. Dep't of Interior (Feb. 2, 1949) (appended to the EEOC's petition for rehearing). The Court in *Wyoming* was well aware of the existence of 5 U.S.C. 8335(b) (see 460 U.S. at 243 n.17; *id.* at 263 (Burger, C.J., dissenting)), but it nevertheless remanded the case with the manifest expectation that the State would have to demonstrate at trial that age 55 was a BFOQ for game wardens. See 460 U.S. at 240.

programs at issue the opportunity to review the mandatory retirement provisions. During consideration of the ADEA amendments of 1978, which first made mandatory retirement unlawful, Representative Spellman offered an amendment, on behalf of the House Post Office and Civil Service Committee, to retain mandatory retirement provisions for certain federal employees, including law enforcement officers. In introducing the amendment, Representative Spellman stated (123 Cong. Rec. 30556 (1977), *reprinted in* Office of the General Counsel, EEOC, *Legislative History of the Age Discrimination in Employment Act* 415 (1981) [hereinafter cited as *Leg. Hist. ADEA*):

I hasten to point out that this amendment does not indicate opposition *per se* [sic] to elimination of mandatory retirement for air traffic controllers, firefighters, and other specific occupations.

However, since most of these mandatory retirement provisions are part of liberalized retirement programs, our committee believes that such provisions should not be repealed until the individual retirement programs have been reexamined.

The amendment will provide the opportunity for review of these retirement programs and their mandatory retirement provisions.

Representative Hawkins, Chairman of the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, stated in agreeing to the amendment (*ibid.*):

By this action we are not reaffirming the mandatory retirement ages in the statutes applicable to these positions. The sole purpose of this agreement is to afford the committees the opportunity to review their statutes.

See also *Vance v. Bradley*, 440 U.S. 93, 97 n.12 (1979). Thus, Congress plainly did not intend that retirement provisions for federal employees be used as a guide to interpreting the ADEA; to the contrary, it recognized

that those civil service provisions might well be at odds with the ADEA, and it determined to reconsider whether they should be perpetuated.⁵ In short, retention of the federal retirement provisions resulted from congressional caution and the division of jurisdiction between House committees, not from any factual determination that the standards for a BFOQ had been met.⁶

c. Moreover, the decision of the court of appeals is flatly inconsistent with the fundamental policies of the ADEA. Section 2(b) of the Act states that its purpose is "to promote employment of older persons based on their ability rather than age." 29 U.S.C. 621(b). The Act was designed to permit older employees to be judged on the basis of their actual individual abilities, rather than stereotypes. As stated in the House report on the ADEA:

The case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions.

⁵ There is no merit to the court of appeals' suggestion (App., *infra*, 7a-8a) that there is something inherently wrong about this disparate treatment of federal and local firefighters. It is clear that Congress may take one step at a time in implementing necessary reform, attacking a problem in one area without acting in all related areas. See, e.g., *Cleland v. National College of Business*, 435 U.S. 213, 220 (1978); *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966). See also *Mahoney v. Trabucco*, 738 F.2d 35, 41 (1st Cir. 1984).

⁶ Indeed, the very terms of Section 8335(b) make clear that it cannot represent a congressional finding that age 55 is a BFOQ for firefighters. Under the statute, a firefighter is not retired until he or she has 20 years of service regardless of age, and the agency head may exempt the employee from separation until age 60. Thus, Congress recognized that firefighters can continue to perform effectively and safely after 55, and that individualized determinations of fitness are possible.

H.R. Rep. 805, 90th Cong., 1st Sess. 7 (1967); *Leg. Hist. ADEA* 80. Similarly, the House report on the 1978 amendments stated with respect to BFOQ's and employment in hazardous occupations:

In most cases, more important than the possible decline of capabilities experienced with age is the fact that this decline varies with individuals as to age and intensity, varies in importance [as] to particular jobs, and may be compensated for by other attributes which often increase with age, for example, experience and judgment.

H.R. Rep. 95-527, 95th Cong., 1st Sess. Pt. 1 at 12 (1977); *Leg. Hist. ADEA* 372.

While the BFOQ defense permits the use of a mandatory retirement age in certain cases, it does not alter the congressional mandate for fact-based decision making. The employer must show a "factual foundation" to establish a BFOQ in order correctly to balance the employee's right to fair treatment against the employer's interest in safety and efficiency. See *EEOC v. County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982). The district court found here that the City failed to demonstrate such a factual foundation, and those findings are unchallenged. The court of appeals' holding that these factual findings are irrelevant, which is based on a plainly erroneous view of congressional intent derived from another statute, seriously undermines the overriding policy of the ADEA to eliminate the use of age limits to deny employees the right to have employment determinations made on the basis of facts and individual abilities.⁷

⁷ The court of appeals' explanation that its strained interpretation of the ADEA was compelled by the need to avoid "serious constitutional questions" (see App., *infra*, 9a-14a) is seriously mistaken; this case presents no constitutional question that has not already been settled by this Court. *Wyoming* clearly establishes that application of the ADEA to employment practices of

2. The decision below also creates a clear conflict in the courts of appeals. In *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743 (7th Cir.), cert. denied, No. 83-205 (Nov. 28, 1983), an assistant fire chief challenged his involuntary retirement at age 55, the mandatory retirement age for all "protective service" employees. The City raised the exact BFOQ defense relied upon below, arguing that Congress could not have intended to prohibit state and municipal employers from retiring local firefighters at age 55 while, at the same time, authorizing compulsory retirement of federal

state and local governments is constitutional under the Commerce Clause, which makes it unnecessary to decide whether it could be authorized by Congress's power under the Fourteenth Amendment. The court of appeals' suggestion that *Wyoming's* Commerce Clause holding is limited to state game wardens (App., *infra*, 11a-12a) is wholly without foundation. The decision in *Wyoming* did not turn on the nature or degree of importance of the game warden's duties. The Court stated that wardens performed "a traditional state function" and assumed that the State's regulation of the terms and conditions of their employment was an attribute of state sovereignty; it held that the ADEA did not impair that sovereignty because compliance with the Act did not threaten the state's legitimate interest in retaining only physically fit wardens. 460 U.S. at 239-240. The identical analysis applies here in the case of firefighters; the ADEA does not impair the City's interest in ensuring that its firefighters are able to perform their job functions effectively.

Finally, the court's statement that its decision avoids a difficult separation of powers question (App., *infra*, 13a-14a) is misconceived. This case merely presents an ordinary question of interpreting a federal statute in order to comply with Congress's intent. If Congress actually intended that age 55 for firefighters be established as a per se BFOQ under the ADEA, then the court of appeals' statutory holding would be correct. But if Congress did not so intend, as we believe to be manifest, then the decision below does not protect separation of powers at all; to the contrary, it frustrates the intent of Congress in enacting the ADEA and unjustifiably curtails the protections established by the legislature.

firefighters at the same age. 697 F.2d at 748-749. The Seventh Circuit flatly rejected this argument, explaining that Congress's decision that "age 55 is an appropriate retirement age for one group of firefighters does not automatically establish that the same retirement age is a valid BFOQ, under * * * the ADEA, for a wholly different group of employees." *Id.* at 749. The court held that, despite the existence of 5 U.S.C. 8335(b), the City could establish its BFOQ defense only by means of "objective and credible evidence" at trial. 697 F.2d at 750. See also *Heiar v. Crawford County*, No. 83-1872 (7th Cir. Aug. 20, 1984), slip op. 12 (noting and rejecting the decision below).

The decision in *Orzel* accords with the prevailing view on this issue. In *EEOC v. County of Los Angeles*, 706 F.2d 1039 (9th Cir. 1983), cert. denied, No. 83-332 (Jan. 16, 1984), the county defined its maximum hiring age of 35 for helicopter pilots and deputy sheriffs as a BFOQ, arguing that restrictions authorized for certain federal occupations by 5 U.S.C. 3307(d) should apply equally to similar state and local occupations. The Ninth Circuit disagreed, finding that this argument had been considered and rejected in *EEOC v. Wyoming*, 460 U.S. at 243 n.17. 706 F.2d at 1041-1042. In *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982), the court ruled that the existence of an FAA regulation establishing age 59 as the maximum for commercial airline pilots did not establish that age as a BFOQ for private pilot employees not covered by the regulation. See also *Mahoney v. Trabucco*, 738 F.2d 35, 41 (1st Cir. 1984) (noting that Congress need not adhere to ADEA standards in setting mandatory retirement ages for federal personnel). And other courts have specifically rejected the contention that age is a per se BFOQ for firefighters, without specifically addressing the relevance of the federal statute. See *EEOC v. City of St.*

Paul, 671 F.2d 1162, 1166-1167 (8th Cir. 1982); *Aaron v. Davis*, 414 F. Supp. 453, 460-463 (E.D. Ark. 1976).

Thus, the decision below creates a situation in which employees protected by the ADEA will be subjected to disparate treatment depending on their place of employment. Employees in most circuits will retain the protections established for them in the ADEA and will be entitled to have their fitness to work be determined on a case-by-case basis unless an employer can demonstrate with evidence that age is a BFOQ for a job. However, firefighters and law enforcement personnel throughout the Fourth Circuit will be subject to the imposition of arbitrary age limits without any showing that the rigid limits are necessary. In view of this inequality in treatment of large numbers of persons and the error of the decision below, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1984



APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 81-1965

(Argued Sept. 1, 1983

Decided April 4, 1984)

ROBERT W. JOHNSON, AUGUST T. STERN, JR.,
THOMAS C. DOYLE, JAMES LEE PORTER, EQUAL
EMPLOYMENT OPPORTUNITY COMMISSION, MITCHELL
PARIS, AND ROBERT L. ROBEY, APPELLEES,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, A
MUNICIPAL CORPORATION, APPELLANT,

and

HYMAN A. PRESSMAN, AS CHAIRMAN, AND DONALD D.
POMERLEAU, CALHOUN BOND, EDWARD C.
HECKROTTE, SR., CHARLES DAUGHTERTY, PAUL C.
WOLMAN, JR., AND CURT HEINFELDEN, AS MEMBERS
OF THE BOARD OF TRUSTEES, FIRE & POLICE
EMPLOYEES RETIREMENT SYSTEM OF THE CITY OF
BALTIMORE, DEFENDANTS

MURNAGHAN, *Circuit Judge*:

Plaintiff, Robert W. Johnson, a Baltimore City firefighter, five of his fellows, and the EEOC, as intervenor, brought suit under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, complaining that the Baltimore City pension provisions for firefighters impermissibly discriminated on grounds of

age.¹ In their action, instituted on May 29, 1979, plaintiffs sought primarily an injunction prohibiting compelled retirement before an employee had reached sixty-five.

Plaintiff Johnson and four of the other five individual plaintiffs had attained the age of sixty years when the suit was filed.² A consensual temporary restraining order was entered permitting the five individuals to continue in active employment status with the fire department pending resolution of the case. When suit was brought, Plaintiff James L. Porter was only thirty years of age. The district court determined, however, that Porter had standing inasmuch as uncertainty as to the prospective mandatory retirement age could presently affect his decision whether to remain an employee of the fire department or to seek employment elsewhere. After a court trial, the district court entered judgment for the plaintiffs. *Johnson v. Mayor and City Council of Baltimore*, 515 F.Supp. 1227 (D. Md. 1981), *cert. denied*, 455 U.S. 944, 102 S.Ct. 1440, .. L.Ed.2d 656 (1982).

For some time, prior to 1962, the overall retirement system covering Baltimore City employees generally applied to firefighters. Under that plan, retirement was not mandatory until the employee had attained the age of seventy years. In 1962, however, the City established the Fire & Police Employees Retirement System (F & PERS), which in part provided pension benefits for all uniformed Fire Department personnel. The City

¹ Complaint was also made of violations of the Fair Labor Standards Act, 29 U.S.C. § 215 (an enforcement provision incorporated into the ADEA) and the equal protection clause of the Fourteenth Amendment to the United States Constitution, triggering violation of 42 U.S.C. § 1983.

² The mandatory retirement age was generally 55, but, for those already employed as firefighters when the mandatory retirement age became effective, a transitional age of 60 was in effect.

obtained enabling legislation from the State of Maryland for the F & PERS at the urging of the union, to which the individual plaintiffs belonged.

Among the motivating factors for the adoption of the F & PERS was a belief that exposure to medical disablement in stressful circumstances increased with age. The F & PERS accordingly provided for mandatory retirement at the age of fifty-five (sixty in transitional cases involving firefighters in service on July 1, 1962, the date when the new plan went into effect).

We first consider plaintiffs' claims based on the equal protection clause and 42 U.S.C. § 1983. For Fourteenth Amendment purposes, plaintiffs have established neither inherent unreasonableness nor a denial of equal protection amounting to constitutional deprivations. The legislation was well within the discretionary powers of the deliberating body, state or federal, especially since "rationality" rather than "strict judicial scrutiny" is the test. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).³

The plaintiffs' complaint, in reality, boils down to an objection that there is too much equality in a requirement that all firefighters retire at fifty-five. The factual scenario is entirely devoid of any indicated attempt to punish individual employees or to seek an unwarranted advantage for the City. The City established the F & PERS in part to address concerns about the continued ability of the City's firefighters to respond efficiently and effectively to the demands of firefighting. The legislation simply reflected a preference for an inflexible age determination in lieu of case-by-case examination leading to decision on the individualized basis of each

³ This Court has already so concluded. *Arritt v. Grisell*, 567 F.2d 1267, 1271-72 (4th Cir. 1977).

and every employee's medical condition, as monitored and remonitored from time to time.

We therefore conclude that (a) there are not sufficient grounds to support a determination that there has been a violation of the equal protection clause, and that (b) therefore, no basis exists for the award of remedies under 42 U.S.C. § 1983.

We next consider plaintiffs' claim under the Age Discrimination in Employment Act of 1967. At the time the city established the F & PERS, the ADEA had not yet been enacted. The Act prohibits "various forms of age discrimination in employment, including the discharge of workers on the basis of age." *Equal Employment Opportunity Commission v. Wyoming*, ___ U.S. ___, ___, 103 S.Ct. 1054, 1058, 75 L.Ed.2d 18 (1983); 29 U.S.C. § 623(a). In 1974 the ADEA was extended generally to the states and their political subdivisions as employers. 29 U.S.C. § 630(b)(2). It also was made applicable to a number of federal instrumentalities, but not to the agencies hiring federal police or firefighters, *See* 29 U.S.C. § 633a(a).

The Act initially protected workers between the ages of forty and sixty-five. 29 U.S.C. § 631. In 1978, Congress raised the maximum age to seventy. Age Discrimination in Employment Act Amendments of 1978, 92 Stat. 189.⁴

The ADEA, however, does not flatly prohibit consideration by employers of age in all instances. Instead, consistent with its underlying purpose of eradicating *arbitrary* age discrimination, the Congress recognized that "criteria based on age are occasionally justified." *EEOC v. Wyoming*, ___ U.S. at ___, 103 S.Ct. at 1058. The ADEA therefore deems lawful certain otherwise prohibited employment practices

⁴ Plaintiffs, nevertheless, limit their request for relief to periods prior to their attaining 65.

where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

29 U.S.C. § 623(f)(1).

In *EEOC v. Wyoming*, *supra*, the Supreme Court provided guidance for determining the existence of a bona fide occupational qualification. There the Court considered the State of Wyoming's policy of mandatory retirement of its game wardens at age fifty-five. The Court rejected the state's contention that the Tenth Amendment,⁵ as construed in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), rendered Wyoming immune from federal intervention with respect to the regulation of its game wardens.

The Court did not, however, declare the state's mandatory retirement age invalid under the ADEA. To the contrary, it reiterated that the mandatory retirement age could remain undisturbed if the state could prove that age was a bona fide occupational qualification for game wardens.

Perhaps more important, appellees remain free under the ADEA to continue to do *precisely what they are doing now*, if they can demonstrate that age is a "bona fide occupational qualification" for the job of game warden. [Citation omitted]. Thus, in distinct contrast to the situation in *National League of Cities*, *supra*, [426 U.S.] at 848 [96 S.Ct. at 2472], even the State's discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, *but is merely being tested against a reasonable federal standard*.

⁵ The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people."

EEOC v. Wyoming, ____ U.S. at ____, 103 S.Ct. at 1062.⁶ The Court remanded the case for a determination as to whether the mandatory retirement at fifty-five was in fact a *bona fide* occupational qualification, i.e., did it satisfy a reasonable federal standard test.⁷

In light of the Court's disposition of *EEOC v. Wyoming*, we must initiate a search for a "reasonable federal standard" by which to test whether age is a *bona fide* occupational qualification for the City of Baltimore's firefighters. Congress has, however, made the search a simple one. With respect to federal firefighters, Congress has provided the standard. The same Congress that extended the ADEA to the states and their political subdivisions reinvigorated the requirement mandating retirement as a general matter at fifty-five⁸ for federal police and firefighting employees. Pub.L. 93-350, 88 Stat. 356, 5 U.S.C. §8335(b).⁹ The Legislative History accompanying the passage of P.L. 93-350 reveals the Congressional concern for the taxing nature of firefighting endeavors:

⁶ Emphasis supplied for the phrase "but is merely being tested against a reasonable federal standard."

⁷ On remand, a jury found that mandatory retirement at fifty-five was a *bona fide* occupational qualification for Wyoming's game wardens. See *EEOC v. Wyoming*, No. C 80-0336 B (D. Wyo. 1983).

⁸ The age could be extended to sixty upon exemption in individual cases by the head of the federal agency involved.

⁹ In pertinent part, 5 U.S.C. § 8335(b) states:

(b) A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. . . .

The history of retirement legislation dealing with law-enforcement officers and firefighters shows Congressional intent to liberalize retirement provisions so as to make it feasible for these employees to retire at age 50. This intent has been based on the nature of the work involved and the determination that these occupations should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service. They are occupations calling for the strength and stamina of the young rather than the middle age. Older employees in these occupations should be encouraged to retire.

Sen.Rep. No. 93-948, 93d Cong., 2nd Sess. in 1974 U.S. Code Cong. & Ad.News 3698, 3699.¹⁰

Where Congress itself has deemed age to be a *bona fide* occupational qualification for federal firefighters, we perceive no justification for ignoring the Congressional mandate in ascertaining "a reasonable federal standard" by which to measure firefighting in the City of Baltimore. Both federal and city firefighters are en-

¹⁰ Prior to the passage of the bill, Robert Hampton, then-chairman of the U.S. Civil Service Commission, provided the Senate Committee on Post Office and Civil Service with the Commission's views on the bill. In discussing the then-existing retirement scheme, Mr. Hampton observed:

The present preferential computation for law enforcers and firefighters was proposed and justified as a means for keeping the service young by encouraging the retirement of persons who, because of the vigorous demands of their positions, are prematurely less able to perform required duties.

* * * *

The ineffectiveness of the present early law enforcement retirement provision (in accomplishing its intended purpose of assuring a young, vigorous Federal law-enforcement organization) is readily apparent. . . .

Id. at 3705.

gaged in extremely stressful and hazardous activities designed to promote public safety. Absent a determination that age, specifically no more than fifty-five as a general rule, is a *bona fide* occupational qualification for firefighters, we would be compelled to conclude that Congress, in authorizing the automatic retirement of federal police and firefighting personnel, adopted an occupational qualification that is not, or might not be, *bona fide*. A court should not lightly make such a determination as to Congressional purpose.

The existence of a Congressional determination of the reasonable federal standard for firefighters distinguishes the fact pattern in the instant case from that in *EEOC v. Wyoming*. No comparable federal statute exists insofar as federal game wardens are concerned. It therefore devolved upon the district court in *Wyoming* to ascertain, on remand, by consideration of conflicting expert testimony, the acceptability of the mandatory retirement provisions. Similarly, in the absence of Congressional guidance, a trial would have been necessary to determine whether the City's use of age is a *bona fide* occupational qualification for its firefighters. In such an instance, we might well be persuaded by the thorough, impeccably reasoned opinion, issued by Judge Alexander Harvey II after a bench trial below.¹¹ Instead, we reverse the decision below, in recognition of the fact that, by Congress' own reasonable federal standard, age is a *bona fide* occupational qualification for the job of firefighting in the City of Baltimore.¹²

¹¹ We note in passing that Judge Harvey rendered his decision almost two years prior to the Supreme Court's decision in *EEOC v. Wyoming*, *supra*.

¹² To the extent that the dissent may suggest that retirement of federal firefighters at age 55, under the provisions of 5 U.S.C. § 8335(b), may be voluntary rather than mandated, I respectfully suggest that the actuality is otherwise, and was known by Congress to be so. Prior to enactment of the statute

Our conclusion is compelled further by the well-established rule that resolution of an unresolved and serious constitutional question should be avoided if a reasonable statutory interpretation would lead to a result obviating the necessity for a resolution of an issue of basic law.¹³ Here we avoid not one, but three, such potentially serious constitutional questions.

First, for Judge Harvey, the power of Congress, under § 5 of the Fourteenth Amendment, to extend the ADEA to state and local governments appeared to have been settled by this court's decision in *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977).¹⁴ The validity of that conclusion however, is questionable after *EEOC v. Wyoming*, *supra*.¹⁵ We therefore perceive that the

in 1974, the letter of Robert Hampton, referred to *supra* in n. 10, observed that under the bill which ultimately became 5 U.S.C. § 8335(b) "employees in these occupations would *generally* be subject to *mandatory* retirement at age 55." (Emphasis supplied). The employees to whom reference was made were "employees whose duties are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States or employees whose duties are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus."

¹³ "[W]hen the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

United States v. Thirty-Seven Photographs, 402 U.S. 363, 369, 91 S.Ct. 1400, 1404, 28 L.Ed.2d 822 (1971), *quoting* *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932).

¹⁴ "... after considering the legislative history . . . we conclude that in enacting ADEA and in extending it to the states Congress exercised its powers under § 5 of the Fourteenth Amendment." *Id.* at 1269-71.

¹⁵ In *EEOC v. Wyoming*, the Supreme Court relied exclusively on the Commerce Clause. Justice Brennan, writing for the bare majority of five justices, specifically left open whether

question is both unresolved and close as to whether § 5 of the Fourteenth Amendment generates the power to permit, in the circumstances here presented, congressional extension of the ADEA to state and local governments.¹⁶

the result could be reached "as an exercise of Congress's powers under § 5 of the Fourteenth Amendment." *Id.*, ____ U.S. at ____, 103 S.Ct. at 2064. However, Justice Stevens, concurring, concluded: "In final analysis, we are construing the scope of the power granted to Congress by the Commerce Clause of the Constitution." *Id.*, ____ U.S. at ____, 103 S.Ct. at 1065. The four dissenting justices explicitly concluded that § 5 of the Fourteenth Amendment was not a source of Congressional power. Since equality is apparent in a mandatory retirement at fifty-five provision applicable to all, enactment of a federal statute purporting to invalidate such state law may not readily be deemed to amount to enforcement of the provisions of the Fourteenth Amendment. That implies that there simply was not a majority for the proposition that § 5 of the Fourteenth Amendment could be resorted to for purposes of extending the ADEA to the states and their political subdivisions, insofar as a mandatory retirement age of 55 for firefighters and policemen is concerned.

¹⁶ It is to be observed that *Arritt v. Grisell*, *supra*, is not, itself, necessarily wrongly decided, only that it has, perhaps, been too broadly interpreted. It concerned a state law prohibiting outright any application for appointment to a position as a police officer by someone over 35 years of age. The plaintiff was 40. During the next fifteen or twenty, or more, years of his life, assuming he was qualified in all other respects, the inequality of treatment as between him on the one hand, and all police officers of his age or older on the other, would be irrational and, hence, patent. Such disparity might well constitute a denial of equal protection. If so, under § 5 of the Fourteenth Amendment, extension of the ADEA to the state, to that extent, would, in any event, regardless of how the question might be resolved in the case *sub judice*, be permissible since there would be violation of a right protected by the Fourteenth Amendment. However, the mandatory retirement provisions, applicable at 55, reach all firefighters (save those in transition, all of whom, equally, must retire at 60), and an analogous differ-

Second, the power of Congress under the Commerce Clause to extend the ADEA to City firefighters may yet remain unanswered after *EEOC v. Wyoming*. The mandatory retirement provision at issue in *EEOC v. Wyoming* affected only game wardens with statewide powers. *National League of Cities v. Usery, supra*, on the other hand concerned "... the State's abilities to structure employer-employee relationships in such areas as firefighters, police protection, sanitation, public health, and parks and recreation." *Id.* 426 U.S. at 851,¹⁷ 96 S.Ct. at 2474.

The firefighters in the instant case were far more localized than state game wardens, being employees of a single political subdivision, and so more removed from the federal government and its national concerns. Each case was decided by a vote of five to four.¹⁸ Whether

ence in treatment of those similarly situated simply is not present.

The identical distinction from the case before us is applicable to *EEOC v. County of Los Angeles*, 706 F.2d 1039 (9th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984) (All applicants 35 and older for positions as deputy sheriff or fire helicopter pilot automatically and invariably turned down).

Cf. Stewart v. Smith, 673 F.2d 485 (D.C.Cir. 1982).

¹⁷ The majority repeatedly expressed concern for "essential police and fire protection," *id.* at 846, "fire suppression endeavors," *id.*, and "fire prevention," *id.* at 851, 96 S.Ct. at 2474.

¹⁸ The majority in *National League of Cities* consisted of Chief Justice Burger, and Stewart, Blackmun, Powell and Rehnquist, JJ., with Brennan, White, Marshall and Stevens, JJ. in dissent. Assuming that Justice Stewart's vote would have coincided with that of Justice O'Connor, the decision in *EEOC v. Wyoming* is the product of a shift in position of Justice Blackmun. "The key to understanding what remains of *National League of Cities* lies in the mind-set of Justice Blackmun, who was the only Justice to join the majorities in both *National League of Cities* and *EEOC* (but who neglected to explain his change of heart in *EEOC*) [footnote omitted]." *The Supreme*

the Supreme Court would view the City's firefighters as more akin to Wyoming's game wardens, or to the employees at issue in *National League of Cities v. Usery*, is again both an unresolved and narrow question, beyond the scope of this case as a consequence of our disposition on a reasonable grounds of statutory interpretation.¹⁹

Court, 1982 Term, 97 Harv.L.Rev. 70, 206 (1983). We are particularly leery of seeking to resolve a close constitutional issue where such resolution requires the prediction as to how an individual Supreme Court Justice would vote. Especially is that so where one choice involves firefighters, the decision that the Commerce Clause power did not extend to them having been deemed by him to be "necessarily correct," and not impinging on "areas such as environmental protection," see *National League of Cities*, 426 U.S. at 856, 96 S.Ct. at 2476 (Blackmun, J. concurring), while the other involves game wardens, an occupation different in some not insignificant respects from that of firefighters.

¹⁹ The dissent has perceived "no substantial distinction between the firefighters in this case and the game wardens in *Wyoming*." It should be enough simply to point out in rejoinder that Congress *has* mandated retirement at 55 for firefighters but *has not* done so for game wardens.

Moreover, Justice Brennan, distinguishing, not overruling, *National League of Cities*, found, in *Wyoming*, "the degree of federal intrusion in this case is sufficiently less serious than it was in *National League of Cities*." A crucial difference is that one dealt with game wardens, the other specifically with firefighters, among others.

To supplement that proposition, one may ponder the consideration that it has been judicially recognized that "fire fighting is among the most hazardous of all occupations." *Aaron v. Davis*, 414 F. Supp. 453, 457, 462 (E.D.Ark.1976). Firefighters afford frontline protection against physical injury or death, not to mention property loss, through conflagration. The same cannot be said for game wardens, and impairment of state ability "to structure . . . integral operations," *Wyoming* ____ U.S. at ____, 103 S.Ct. at 1062, is simply less evident in their case. Federal intrusion is indeed "minimal" in the case of game wardens. *Wyoming*, ____ U.S. at ____, 103 S.Ct. at 1065, n. 17.

Third, the constitutional separation of powers doctrine remains a viable restriction on the exercise of both legislative and adjudicative power. "[W]e consistently have emphasized that the federal lawmaking power is vested in the legislative, not the judicial, branch of government. . . ." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95, 101 S.Ct. 1571, 1582, 67 L.Ed.2d 750 (1981); see generally *Springer v. Philippine Islands*, 277 U.S. 189, 201-2, 48 S.Ct. 480, 482, 72 L.Ed. 845 (1928). Congress has, in 5 U.S.C. § 8335(b), adopted a legislative answer to the question of whether the purely chronological age of not over 55 is or is not a *bona fide* occupational qualification for firefighting. It is questionable whether we can constitutionally supply the answer instead by an adjudicative, case-by-case approach. The question appears to be the same when raised for firefighters, in San Francisco or in Baltimore.²⁰ The situation may not fit the intended accommodation of differing factual circumstances lending themselves to case-by-case resolution.

In the United States of America we are blessed with a Constitution which, both in words and in wise interpretation over the years, is intelligently flexible. It will bend before it breaks, displaying a pliability enabling it to accommodate to new challenges and to address old, persistent problems. Still it cannot simply be altogether without structure. Too many repeated folds or creases can lead to a tear along one of the lines of stress. The concerns of a constitutional nature potentially present, if all should have to be addressed, might lead to an unfortunate rupture. Fortunately, we are spared the necessity to explore the three unclear issues of basic law

²⁰ Could one properly denominate the approach "adjudicative," rather than legislative, if, depending on what two different "factfinders" decided, firefighters at Fort Meade, Maryland would have to retire at 55, while those at the Aberdeen Proving Grounds could continue to 70?

to which we have alluded. We need not grapple with whether legislation would have led to enforcement of the provisions of the Fourteenth Amendment. We need not explore just how far principles extend in terms of the power of the federal government to impinge on the exercise of integral governmental functions by the states. Nor must we decide whether action in a particular area is legislative or judicial. "It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided." *United States v. Clark*, 445 U.S. 23, 27, 100 S.Ct. 895, 899, 63 L.Ed.2d 171 (1980); *see also Johnson v. Robinson*, 415 U.S. 361, 366-67, 94 S.Ct. 1160, 1165-1166, 39 L.Ed.2d 389 (1974).

We conclude, therefore, that the ADEA did not establish for the firefighters of Baltimore City a bar to mandatory retirement at age fifty-five (sixty for transitional cases). *EEOC v. Wyoming*, properly viewed, encourages the conclusion that the ADEA and 5 U.S.C. § 8335(b) are not mutually exclusive or antagonistic, but should be read to exist in a harmonized way, especially when we thereby avoid close and unresolved constitutional questions.²¹ Finally, by viewing the provi-

²¹ Cf. *Bowman v. United States Department of Justice, Federal Prison System*, 510 F. Supp. 1183, 1186 (E.D. Va.1981), *aff'd by unpublished opinion*, No. 81-2143 (4th Cir. 1982); *Palmer v. Ticcione*, 576 F.2d 459, 465 n. 7 (2d Cir.1978).

Citing a quotation in *Wyoming of Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), the dissent expresses the view that Congress may assert supremacy by requiring private parties to follow a legislative provision at odds with a federal statute imposing "mandatory retirement on a small class of its own workers." There is no doubt that such may be the case. But, when the problem arises in the context of whether Congress meant to force differing rules on one of its constituent sovereigns opposed to those applicable to itself in virtually identical circum-

sions of the City ordinance as properly enforceable, we enhance the promotion of harmony between state and federal legislation.²²

Accordingly, the judgments below are reversed and the case remanded for entry of judgments in favor of the defendants.

REVERSED.

stances it becomes far more likely that Congress has not so intended.

²² Numerous cases have addressed similar factual situations, apparently without such considerations in mind, simply assuming, without discussion, that (a) there was congressional power to extend the ADEA to all state or municipal employees, including firefighters, (b) the power had been fully exercised in enacting the ADEA, extending it to police and firefighters, and (c) without regard to the incongruity in treatment of federal and state firefighters, unless a b.f.o.q. was made out to the satisfaction of the factfinders, on an individual case-by-case basis, a mandatory retirement age imposed by a state or political subdivision was *ipso facto* illegal. The cases proceeding on the line advocated by the plaintiff, and presenting the risk of differing results, case-by-case and political-subdivision-by-political-subdivision, lack persuasiveness for us inasmuch as they do not address the very questions which appear to be controlling. *E.g.*, *EEOC v. County of Los Angeles*, *supra*; *Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743 (7th Cir. 1983); *EEOC v. City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982); *EEOC v. County of Santa Barbara*, 666 F.2d 373 (9th Cir. 1982); *Aaron v. Davis*, 414 F.Supp. 453 (E.D.Ark.1976).

Other cases provide no assistance, inasmuch as they deal with private, not state or municipal employers. *E.g.*, *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir.1982); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976); *contra*, *Maki v. Commissioner of Education of the State of New York*, 568 F.Supp. 252 (N.D.N.Y. 1983).

HARRISON L. WINTER, *Chief Judge*, dissenting:

While I agree with the majority, for the reasons assigned by it that there is no merit in plaintiffs' claims based on the equal protection clause of the fourteenth amendment,¹ I do not agree that Congress has established a bona fide occupational qualification (BFOQ) for Baltimore City firefighters. Indeed, I question that what Congress has done with regard to federal employees has any relevance at all to a correct decision of this case. Of course, I recognize that the proscription of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, against mandatory retirement of employees under the age of seventy may be modified "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. § 623(f)(1). The district court in the instant case, however, found as a fact that a BFOQ for mandatory retirement before age seventy was not proved, and I do not think that its finding was clearly erroneous.

I therefore respectfully dissent.

I.

Baltimore City requires firefighters who became such after July 1, 1962 to retire at age fifty-five and all firefighters in service on July 1, 1962 to retire by age sixty. It is uncertain, however, at what age Congress has mandated retirement for federal firefighters. To me, certainty in what Congress has prescribed and exact comparability with what Baltimore has prescribed is the beginning point for determining if there is a congressionally established BFOQ for firefighters.

¹ I am also in agreement with the district court and the majority that plaintiff James L. Porter, although only thirty-years old when suit was brought, had standing to sue.

The legislation treating federal firefighters is set forth in 5 U.S.C. § 8335(b) and it reads:

A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.²

When §§ 8335 and 8336 are read together, it appears that a federal firefighter *may* retire as early as age fifty-five, *if* he has completed the minimum service requirements of § 8336 so as to be entitled to an annuity (18 years), and *if* his department head does not conclude to require him to work a longer period. He may,

² Section 8336(c), referred to in the text of § 8335(b), states:

(c)(1) An employee who is separated from the service after becoming 50 years of age and completing 20 years of service as a law enforcement officer or firefighter, or any combination of such service totaling at least 20 years, is entitled to an annuity.

(2) An employee is entitled to an annuity if the employee—

(A) was a law enforcement officer or fire-fighter employed by the Panama Canal Company or the Canal Zone Government at any time during the period beginning March 31, 1979, and ending September 30, 1979; and

(B) is separated from the service before January 1, 2000, after becoming 48 years of age and completing 18 years of service as a law enforcement officer or firefighter, or any combination of such service totaling at least 18 years.

however, be required to work until he reaches age sixty, and, he may be required to work beyond age sixty if (a) his department head is delinquent in giving him the 60 days' notice of separation, or (b) he has not completed 18 years of service as required by § 8336(c)(2)(B). It is thus quite clear from the language of the statutes that Congress, unlike Baltimore City, has not opted for the bright-line test of age fifty-five as the mandatory age for retirement (except for certain transitional employees). This makes it impossible for me to say that there is a federally established BFOQ for firefighters at age fifty-five.

Section 8335 in its existing form was enacted in 1974 when, by Pub.L. 93-350, 88 Stat. 356, the mandatory retirement age of seventy was altered to the present alternatives. The legislative history of Pub.L. 93-350 does recite, as the majority sets forth, a congressional intent to liberalize retirement provisions so as to make it feasible for firefighters and law-enforcement officers to retire at age *fifty*. The rationale of the intent is, of course, "the vigorous demands of occupations which are far more taxing physically than most in the Federal Service." Sen.Rep. No. 93-948, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad.News 3698, 3699. It must be remembered, however, that this language was used in relation to *voluntary* retirement, not *involuntary* retirement, as Baltimore City requires. With respect to involuntary retirement, the committee report states, "Additionally, the bill provides for the mandatory retirement of an eligible employee at age 55 or after 20 years, whichever occurs later." *Id.* at 3701. Thus, the legislative history, with its emphasis on "eligible" employee and resort to an alternative formula under which an employee may not be required to retire until he has completed twenty years of service, belies the existence of congressional intent, perceived by the majority, to fix age fifty-five as a BFOQ.

Even if it could be said that Congress established a BFOQ for federal firefighters, I do not think that this would be relevant to a decision of this case. The thesis of the majority was advanced and rejected in an analogous context in *EEOC v. Wyoming*, ___ U.S. ___, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983). Footnote 17 of the *Wyoming* opinion, ___ U.S. at ___, 103 S.Ct. at 1063, 75 L.Ed.2d at 33, discussed the possible application of the third prong of the inquiry delineated in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), for determining the immunity of a local government from an otherwise legitimate exercise of federal power to regulate commerce, i.e., that 'it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional government functions'." *Hodel* at 288, 101 S.Ct. at 2366. The footnote reads:

Even if the minimal character of the federal intrusion in this case did not lead us to hold that ADEA survives the third prong of the *Hodel* inquiry, it might still, when measured against the well-defined federal interest in the legislation, require us to find that the nature of that interest "justifies state submission." *We note, incidentally, that the strength of the federal interest underlying the Act is not negated by the fact that the federal government happens to impose mandatory retirement on a small class of its own workers. See Brief for Appellees 19. But cf. n. 5 supra (no upper age limit on Act's protection of federal employees.) Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in that declaration, and must from that point on evaluate the sufficiency of the*

federal interest as a matter of law rather than of psychological analysis. (Emphasis added)

Wyoming, as I read it, tells us that the broad requirements of ADEA are not to be constricted as a matter of law by what treatment Congress has afforded to comparable federal employees.³ Stated otherwise, the fact that Congress may require some federal firefighters to retire at age fifty-five does not excuse Baltimore from providing the facts necessary to satisfy 29 U.S.C. § 623(f)(1).

II.

Since in my view of the case there is no compelling federal BFOQ, I am brought to a consideration of the correctness of the district court's ground of decision. It found as a matter of fact that Baltimore had not proved a BFOQ for mandatory retirement of firefighters at age fifty-five. From my study of the record, I cannot conclude that this finding is clearly erroneous.

I would affirm the judgment of the district court.

³ The majority also reads *Wyoming* as casting doubt on the power of Congress to extend ADEA to Baltimore firefighters and it justifies its holding as a result obviating the need for a constitutional adjudication. I disagree with this reading of *Wyoming*. I see no substantial distinction between the firefighters in this case and the game wardens in *Wyoming*. Since ADEA was held to be validly applied to the latter, the validity of application to the former would seem clear.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1965

ROBERT W. JOHNSON, ET AL, APPELLEES,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ETC.,
APPELLANT,

and

HYMAN A. PRESSMAN, ETC., ET AL, DEFENDANTS

[Filed June 29, 1984]

ORDER

The appellees' petition for rehearing and suggestion for rehearing en banc has been submitted to the court. Upon the request for a poll of the court of the suggestion for rehearing en banc, Judge Russell, Widener, Hall, Murnaghan, Ervin and Chapman voted to deny rehearing en banc; Judges Phillips, Sprouse and Winter voted to grant rehearing en banc.

IT IS ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc has been denied by the panel.

Entered at the direction of Chief Judge Winter for a panel consisting of Chief Judge Winter, Judge Murnaghan and Judge Butzner.

For the Court,

/s/ JOHN M. GREACEN

JOHN M. GREACEN

Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civ. A. No. H-79-998

ROBERT W. JOHNSON, AUGUST T. STERN, JR.,
THOMAS C. DOYLE, MITCHELL PARIS, ROBERT L.
ROBEY AND JAMES LEE PORTER, PLAINTIFFS,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
INTERVENING PLAINTIFF,

v.

THE MAYOR AND CITY COUNCIL OF BALTIMORE AND
HYMAN A. PRESSMAN, AS CHAIRMAN AND DONALD D.
POMERLEAU, CALHOUN BOND, EDWARD C.
HECKROTTE, SR., CHARLES DAUGHERTY, PAUL D.
WOLMAN, JR. AND CURT HEINFELD, MEMBERS OF THE
BOARD OF TRUSTEES, FIRE AND POLICE EMPLOYEES
RETIREMENT SYSTEM OF THE CITY OF BALTIMORE,
DEFENDANTS.

June 9, 1981

ALEXANDER HARVEY, II, *District Judge:*

In this civil action, the six plaintiffs, who are Baltimore City firefighters, are challenging provisions of the Baltimore City Code which require that certain Fire Department employees retire at the ages of fifty-five and sixty. Plaintiffs contend that this legislation (1) violates provisions of the Age Discrimination in Employment Act of 1967 (the "ADEA"), 29 U.S.C. § 621,

*et seq.*¹ (2) contravenes 42 U.S.C. § 1983; and (3) is violative of the Fourteenth Amendment. As relief, plaintiffs are seeking a declaratory judgment, a permanent injunction, back pay for plaintiff Johnson, attorneys' fees and costs.

Five of the six plaintiffs are presently over sixty years of age.² Had they not filed this suit, each of these five plaintiffs would now have been mandatorily retired, pursuant to applicable provisions of the Baltimore City Code. However, with the consent of the defendants, a Temporary Restraining Order has been entered in this case, permitting these five plaintiffs to retain their jobs and their employment benefits during the pendency of this action. The sixth plaintiff, James Lee Porter, is presently thirty-two years of age. He will be required to retire under the Baltimore City law in question in the year 2003, when he becomes fifty-five.

Named as defendants are the Mayor and City Council of Baltimore and the Chairman and members of the Board of Trustees of the Fire and Police Employees Retirement System of the City of Baltimore (hereinafter the "FPERS"). Subsequent to the commencement of this action, the Equal Employment Opportunity Commission was permitted to intervene as a party plaintiff and has filed an intervening complaint. Following extensive pretrial proceedings, this case came on for trial before the undersigned Judge, sitting without a jury. Testimony was heard from expert and other witnesses, and numerous exhibits have been entered in

¹ Plaintiffs also contend that the City ordinance violates 29 U.S.C. § 215. However, that provision of the Fair Labor Standards Act is merely an enforcement provision incorporated into the ADEA. See 29 U.S.C. § 626(b).

² Plaintiffs Johnson, Stern, Doyle, Paris and Robey are all over sixty years of age. Plaintiffs have complied with the exhaustion requirements of 29 U.S.C. § 626(d).

evidence. Findings of fact and conclusions of law under Rule 52(a), F.R.Civ.P., are contained in this Opinion, whether or not expressly so designated.

I

The challenged provisions of law

Prior to 1962, employees of the Baltimore City Fire Department, like other municipal employees, were covered by the Employees Retirement System of the City of Baltimore (hereinafter the "ERS").³ See Article 22, §§ 1-17, Baltimore City Code (as amended). This pension and retirement system contains a provision for mandatory retirement at age seventy.

Pursuant to enabling legislation enacted by the Maryland State Legislature, the Baltimore City Council, in 1962, approved an ordinance establishing a new retirement system for Fire Department and Police Department employees only, namely the FPERS, which is at issue here. The provisions applicable in this case, as set forth in Article 22, § 34(a), Baltimore City Code (as amended), are as follows:

(2) Any member in service who has attained the age of fifty-five shall be retired on the first day of the next calendar month after attaining such age, except that a member who has attained the rank of Fire Lieutenant or Police Sergeant, or equivalent grade as certified by the Department head and approved by the Board of Trustees, shall be retired when he has attained the age of sixty-five.

* * * * *

(4) Further, anything in this subtitle to the contrary notwithstanding, any employee covered by this System, under the rank of Fire Lieutenant or Police Sergeant, or equivalent grade, who was in

³ Employees of the City of Baltimore other than firefighters and policemen continue to be covered by the ERS.

service on July 1, 1962, may be continued in service until attaining age 60.

In this suit, the plaintiffs contend that these provisions which require them to retire at ages fifty-five and sixty violate the ADEA, § 1983 and the Fourteenth Amendment.

II

Facts

Plaintiff Robert W. Johnson commenced his employment with the Baltimore City Fire Department in October of 1943. On April 29, 1979, Johnson attained the age of sixty years. Under § 34(a)(4), Johnson was retired involuntarily on May 1, 1979. This suit was filed on May 29, 1979. Pursuant to the Temporary Restraining Order entered by the Court, Johnson was restored to pay status on June 11, 1979.⁴ In addition to the other relief sought by the other plaintiffs, Johnson seeks back pay from May 1 to June 11, 1979 in the amount of \$1,000.00. Plaintiff August T. Stern, Jr. commenced his employment with the Fire Department in February 1946. He became sixty years of age on September 17, 1979. Plaintiff Thomas C. Doyle started working with the Fire Department in March of 1947, and became sixty years of age on October 7, 1979. Plaintiff Mitchell Paris commenced his employment with the Fire Department in December of 1946, and he attained the age of sixty on January 21, 1981. Plaintiff Robert L. Robey started working with the Fire Department on October 10, 1951, and became sixty on March 26, 1981. Plaintiffs Stern, Doyle, Paris and Robey have also been continued as Baltimore City firefighters pursuant to this Court's Temporary Restraining Order. Like plaintiff Johnson, they all desire to continue to work for the Baltimore

⁴ Plaintiff Johnson is the only one of the plaintiffs whose employment has been interrupted. Thus, he is the only plaintiff seeking back pay.

City Fire Department beyond age sixty. Plaintiffs are not here challenging the right of the defendants to retire them involuntarily at age sixty-five, which is the mandatory retirement age under present law for Lieutenants and other officers of the Fire Department.

Plaintiff James Lee Porter commenced his employment with the Baltimore City Fire Department on May 6, 1969. On October 23, 2003, plaintiff Porter will attain the age of fifty-five. Since he did not become a firefighter until after July 1, 1962, he will be required under the aforementioned § 34(a)(2) and (4) to retire at age fifty-five whether he wishes to or not.

Plaintiffs Johnson, Stern, Doyle, Paris and Robey were all formerly members of the ERS. When the new ordinance establishing the FPERS was adopted by the City Council in 1962, these five plaintiffs, in 1962 or thereafter, chose to be covered by the new retirement system rather than the old.

III

The ADEA

When it enacted the ADEA in 1967, Congress included a statement of its findings and purpose in passing this legislation. 29 U.S.C. § 621 provides as follows:

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deteriora-

tion of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 623(a)(1) is as follows:

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; * * *

As originally enacted in 1967, the ADEA was not applicable to governmental entities. However, in 1974, Congress amended the Act to include states and political subdivisions within its coverage. The term "employer" now includes "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State * * *" See 29 U.S.C. § 630(b).

Certain employer practices were recognized by the Act as being lawful. § 623(f)(1) provides as follows:

(f) It shall not be unlawful for an employer * * *

(1) to take any action otherwise prohibited under subsections (a) * * * of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age; * * *

As originally enacted in 1967, § 623(f)(2) provided as follows:

(f) It shall not be unlawful for an employer * * *
 (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual;

In 1978, § 623(f)(2) was amended so that it now reads:

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, *and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual.* (Emphasis added.)

Congress added the language emphasized above for the express purpose of overruling the Supreme Court's decision in *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977). See House Conference Report 95-950, 95th Cong., 2d Session, [1978] U.S. Code Cong. and Admin. News, pp. 504, 529. In the *McMann* case, the Supreme Court had held that a bona fide pension plan established prior to the effective date of the ADEA could not be a subterfuge to evade the purposes of the Act. 434 U.S. at 203. The 1978 amendment to § 623(f)(2) makes it clear that the Act applies to FPERS, even though that retirement plan was established before the ADEA was enacted. Furthermore, as the Fourth Circuit noted in *EEOC v. Baltimore and Ohio R.R. Co.*, 632 F.2d 1107, 1112 (4th Cir. 1980), the 1978 amendment explic-

itly prohibits the provisions of § 623(f)(2) from being utilized as a defense to involuntary retirement of protected individuals.

In this suit, plaintiffs assert that § 34(a)(2) and (4) of Article 22 of the Baltimore City Code are contrary to § 623(a)(1) and § 623(f)(2) because the FPERs requires the involuntary retirement of each of them because of their age. Defendants contend (1) that the ADEA is unconstitutional; (2) that plaintiffs have waived their right to rely on the benefits of this federal statute; and (3) that pursuant to § 623(f)(1), age is a bona fide occupational qualification for firefighters which is reasonably necessary to the normal operation of the Baltimore City Fire Department.

IV

The constitutionality of the ADEA as applied to states and political subdivisions

Relying on *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), defendants first contend that the ADEA may not be constitutionally applied to employees of a state or political subdivision. As noted hereinabove, Congress amended the Act in 1974 to include states and political subdivisions within the definition of the term "employer", as used in the Act. See 29 U.S.C. § 630(b).⁵ Defendants contend that by extending the coverage of the ADEA to public employees in 1974, Congress has unconstitutionally usurped the regulation of essential government functions properly reserved to state and local governments.

Defendants' constitutional argument was previously rejected by the Fourth Circuit in *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977). In that case, a police officer in Moundsville, West Virginia had been denied employment by that city because he was forty years of age and

⁵ This amendment became effective on May 1, 1974.

therefore ineligible to take the required physical and mental examinations under West Virginia law, which had established an eighteen to thirty-five year age limit for such applicants. In an opinion written by Judge Thomsen, the Fourth Circuit reversed the District Court's entry of summary judgment in favor of the defendants and remanded the case to the lower court for the development of a full factual record concerning plaintiff's claim that the West Virginia statute violated the ADEA.

As in this case, the defendants in *Arritt* argued that the Supreme Court decision in *National League of Cities v. Usery*, *supra*, invalidated the 1974 amendments to the ADEA which extended coverage of its antidiscrimination provisions to state and local government employers. That decision of the Supreme Court had held that the extension of provisions of the Fair Labor Standards Act to state and local government employees engaged in areas of traditional governmental functions could not be upheld as a constitutionally valid regulation of interstate commerce because the Tenth Amendment limits exercise of the powers of Congress under the commerce clause. After considering the legislative history of the ADEA and the Supreme Court's opinion in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976), the Fourth Circuit in *Arritt* upheld the 1974 amendments to the Act. Writing on behalf of the panel, Judge Thomsen concluded that in enacting the ADEA and extending it to the states, Congress had exercised its powers under § 5 of the Fourteenth Amendment rather than under the commerce clause. 567 F.2d at 1270-1271.

The recent *Arritt* decision is controlling in this case. As the Fourth Circuit there held, the 1974 amendments to the ADEA are not unconstitutional. Thus, the City of Baltimore is subject to the provisions of the ADEA, and if a city ordinance conflicts with provisions of this

Constitutional statute, the ordinance in question must fall.*

V

Waiver

Defendants next argue that even if the City of Baltimore and its Fire Department are subject to the provisions of the ADEA, the plaintiffs waived their right to rely on benefits conferred upon them by this Act when they voluntarily became members of the FPERS in 1962 or thereafter. In support of this contention, defendants assert that five of the plaintiffs contractually agreed to retire at age sixty when they became members of the FPERS.

In 1925, the City of Baltimore established the first actuarially funded pension system in Maryland for the general protection of municipal employees, known as "The Employees' Retirement System of the City of Baltimore" (the "ERS"). See Article 22, §§ 1-17, Baltimore City Code (as amended). That pension system, both then and now, contains a provision for mandatory retirement at age seventy. Both firefighters and policemen were covered by the ERS.

Following various studies supported by City firemen and their unions, a recommendation was made to the City Board of Estimates in 1960 that retirement benefits for members of the Fire Department should be liberalized. Following the enactment of enabling legislation by the State Legislature in 1961, an ordinance was introduced in 1962 before the Baltimore City Council, providing for the establishment of the Fire and Police Employees Retirement System (the "FPERS"). This

* Other cases reaching the same conclusion include *Marshall v. Delaware River & Bay Authority*, 471 F. Supp. 886 (D.Del. 1979); *Remmick v. Barnes County*, 435 F. Supp. 914 (D.N.D. 1977); and *Usery v. Board of Education of Salt Lake City*, 421 F. Supp. 718 (D. Utah 1976).

legislation lowered the mandatory retirement age for firemen and police officers from age seventy to age fifty-five or sixty. A "grandfather clause" was included to permit firefighters, other than officers, who were in service on July 1, 1962 to continue to work until age sixty. Moreover, those in service on that date could, if they chose to do so, continue to be covered by the ERS. However, anyone who was employed after July 1, 1962 was required to retire at the age of fifty-five and was not permitted to be covered by the ERS. Officers of the Fire Department were permitted to continue until age sixty-five before being required to retire.

The proposed new ordinance was presented to the membership of both the Fire Department and the Police Department, and some 59% of the Fire Department personnel affected voted in favor of the new system. In June of 1962, the ordinance was passed by the City Council. Some members of the City Fire Department chose not to join the new system, but continued to be covered by the ERS. Others, including the plaintiffs, elected to become members of the FPERS. Plaintiffs Stern and Doyle joined the new system in 1962, while plaintiffs Robey and Paris did so in 1967. Plaintiff Johnson, in July 1962, initially decided to remain in the ERS, but in June of 1963, he elected to become a member of the FPERS. Defendants contend that when the plaintiffs elected to become members of the new system, they waived any rights they might have under the ADEA and voluntarily agreed to retirement at age sixty.

Before a court can find that a federal right has been waived, it must be established that there was an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). Courts indulge every reasonable presumption against waiver of fundamental rights, and a court cannot presume acquiescence

in the loss of a fundamental right. *Id.* at 464, 58 S.Ct. at 1023.

These principles were recently applied by the Supreme Court in a case presenting the question of a claimed waiver of an employee's rights under Title VII of the Civil Rights Act of 1964. *See Alexander v. Gardner-Denver Company*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). In that case, the Supreme Court concluded that there could be no prospective waiver of an employee's rights under Title VII. Noting that an individual's right to equal employment opportunities represented a Congressional command that each employee be free from discriminatory practices, the Supreme Court pointed out that waiver of such a right would result in defeating the paramount Congressional purpose behind Title VII. 415 U.S. at 51-52, 94 S.Ct. at 1021. Accordingly, the Supreme Court concluded that an employee's rights under Title VII are not susceptible of prospective waiver.

These principles are equally applicable here. Plaintiffs made their decisions to join the FPERS in 1962, 1963 and 1967. The ADEA was enacted by Congress in 1967, but it was not until 1974 that employees of state and local governments were included within provisions of the statute. In 1978, the law was again amended to preclude the involuntary retirement of an individual because of age pursuant to an established pension plan or seniority system. Under these circumstances, it can hardly be concluded that plaintiffs waived their rights under the ADEA by joining the FPERS between 1962 and 1967. In those years, they had no right to challenge provisions of the FPERS which required them to retire at age sixty or fifty-five, and therefore there was no known right for them to relinquish when they decided to join the new retirement system. Under federal standards, one may not relinquish intentionally an unknown right. *Nelson v. Peyton*, 415 F.2d 1154, 1158

(4th Cir. 1969), *cert. denied*, 397 U.S. 1007, 90 S.Ct. 1235, 25 L.Ed.2d 420 (1970); *Dodge v. Turner*, 274 F.Supp. 285, 289 (D. Utah 1967); *see Walker v. Peppersack*, 316 F.2d 119, 127-28 (4th Cir. 1963).

This Court's conclusion that plaintiffs have not waived their rights under the ADEA is supported by the Fourth Circuit's opinion in *McMann v. United Air Lines, Inc.*, 542 F.2d 217 (4th Cir. 1976). In that case, the Court placed no significance on the fact that the plaintiff could have chosen not to join the retirement plan claimed to violate the ADEA. 542 F.2d at 219, n.1.

Nor is there merit to defendants' argument that plaintiffs are bound contractually to retire at ages sixty or fifty-five because they have agreed to the terms of the FPERS. A similar contention was rejected by Judge Miller of this Court in *Chastang v. Flynn & Emrich Co.*, 365 F. Supp. 957 (D.Md.1973). There, the argument had been made that the plaintiffs had waived their Title VII rights by executing releases. Judge Miller held that a statutory right "conferred upon a private party, but affecting the public interest may not be waived or released, if such waiver or release contravenes the statutory policy." 365 F. Supp. at 968. The same principles are applicable here.

For these reasons, this Court finds and concludes that the plaintiffs did not waive or surrender their rights under the ADEA when they joined the FPERS at various times between 1962 and 1967.

VI

The bona fide occupational qualification defense

The principal issue presented in this case and the one to which most of the evidence has been directed is whether age is a bona fide occupational qualification (hereinafter "BFOQ") for Baltimore City firefighters. This defense is specifically recognized by § 623(f)(1), which permits an employer to take any action otherwise

prohibited by the Act where age is a bona fide occupational qualification "reasonably necessary to the normal operation of the particular business * * *" Relying on this statutory provision, defendants contend that the Act is not violated by provisions of the Baltimore City Code which require that five of the plaintiffs retire at age sixty, whether or not they wish to do so.⁷

(a) Prima facie case

Plaintiffs initially have the burden of establishing that their rights under the ADEA have been violated. A *prima facie* case of age discrimination is made out where a plaintiff proves (1) that he is a member of the protected group; (2) that he has been terminated; (3) that he has been replaced by a person outside the protected group; and (4) that he was qualified to do the job. *Marshall v. Baltimore & Ohio Railroad Company*, 461 F. Supp. 362, 372 (D.Md. 1978), *aff'd in part and rev'd in part*, *EEOC v. Baltimore & Ohio Railroad Company*, 632 F.2d 1107 (4th Cir. 1980).

In this case, there is little doubt that plaintiffs have fully satisfied this burden and have established a *prima facie* case under the ADEA. Plaintiffs, who are over sixty years of age, are members of the group protected by the Act. The employment of plaintiff Johnson has in fact been terminated, and the other plaintiffs would have been involuntarily terminated had this Court not entered a Temporary Restraining Order which continued their employment. Had the employment of the plaintiffs been terminated under the FPERS, younger persons would have taken their place. Finally, the evi-

⁷ This portion of the Opinion (Section VI) will discuss only the claims of the five plaintiffs who are presently over sixty years of age. Accordingly, the term "plaintiffs", as used in this Section, refers to all plaintiffs except Porter, whose claim will be discussed hereinafter. The term "firefighters" as used herein, includes emergency vehicle drivers and pump operators.

dence discloses that the plaintiffs, despite their age, are fully qualified to perform their duties as Baltimore City firefighters. No evidence to the contrary has been presented. Rather, the record in this case clearly establishes that plaintiffs' performance of their duties has been more than satisfactory.

For these reasons, this Court finds and concludes that plaintiffs have made out a *prima facie* case of age discrimination under the ADEA. As applied to them, the provisions of § 34(a) which require that they retire involuntarily at age sixty violate the ADEA, unless defendants can prove that their acts under the Ordinance are not unlawful pursuant to § 623(f)(1).

(b) Defendants' burden

Once a plaintiff has made out a *prima facie* case of age discrimination under the ADEA, the burden shifts to the employer to establish a BFOQ defense. *Arritt v. Grisell*, *supra*; *Houghton v. McDonnell Douglas Corporation*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966, 98 S.Ct. 506, 54 L.Ed.2d 451 (1977).^{*} In *Arritt*, the Fourth Circuit rejected the standard adopted by the Seventh Circuit in *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122, 95 S.Ct. 805, 42 L.Ed.2d 822 (1975), for measuring the burden assumed by the employer when a *prima facie* case of age discrimination has been made out. Rather, the Fourth Circuit adopted the two-pronged test formulated in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976). Thus, in this case, the defendants have the burden to show (1) that the BFOQ which it invokes is "reasonably necessary to the essence of its business" of operating an efficient fire department within the City of Baltimore,

^{*} In the *Houghton* case, the Eighth Circuit concluded that the employer's admission that the plaintiff's removal was solely on the basis of his age presented a *per se* violation of § 623(a).

and (2) that defendants have "reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class * * * would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis." 567 F.2d at 1271. In this case, the class involved includes all Baltimore City firefighters, other than officers, who are sixty but not yet sixty-five years of age. Defendants here must prove that there is a factual basis for believing that all or substantially all Baltimore City firefighters between sixty and sixty-five are unable to perform their duties safely and efficiently, or that Baltimore City firefighters between those ages may not possibly or practically be dealt with on an individualized basis.

In considering whether defendants have in this case met their burden of establishing a BFOQ defense, this Court must be guided by the objectives which Congress had in mind when it enacted the ADEA. Congress went so far as to expressly incorporate into the statutory language itself its findings that older workers find themselves disadvantaged in their efforts to retain employment, that the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and that the employment problems of older workers are grave. § 621(a). Congress further expressly stated that the purpose of the ADEA is to promote the employment of older persons based on their ability rather than their age, to prohibit arbitrary age discrimination in employment and to assist employers and workers in finding ways to meet problems arising from the impact of age on employment. § 621(b).

Recent opinions discussing the BFOQ defense asserted by an employer under § 623(f)(1) indicate that the burden imposed on a defendant of establishing this affirmative defense is a substantial one. In *Houghton v.*

McDonnell Douglas Corporation, supra, the Eighth Circuit reversed the finding of the District Court that the employer of a test pilot had properly terminated his employment at age fifty-two, because age was a BFOQ for test pilots. Citing *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 235 (5th Cir. 1969), the Eighth Circuit concluded that to uphold the District Court's finding that defendant had met its burden in that case would allow the BFOQ exception to swallow the rule. 553 F.2d at 564. In *EEOC v. City of St. Paul*, 500 F.Supp. 1135, 1146 (D. Minn. 1980), the Court, in concluding that age was not a BFOQ for fire chiefs of the City of St. Paul, noted that Congress "apparently intended that the bona fide occupational qualification be very narrowly construed, and thus applicable in very few cases. See 29 C.F.R. § 860.102 (1980)." In *Sexton v. Beatrice Foods Co.*, 630 F.2d 478, 486 (7th Cir. 1980), the Seventh Circuit, in considering § 623(f)(2), observed that exceptions of this sort to a remedial statute are to be narrowly and strictly construed.

(c) Discussion

On the record here, this Court finds and concludes that defendants have not met their burden of proving under § 623(f)(1) that age constitutes a BFOQ for the requirement of § 34(a) that the plaintiffs retire at age sixty. Defendants have not convinced this Court that the retirement of City firefighters at that age is reasonably necessary for the operation of an efficient fire department within the City of Baltimore. Furthermore, defendants have not shown, on this record, that there is a factual basis for them to believe that all or substantially all Baltimore City firefighters between the ages of sixty and sixty-five, other than officers, would be unable to perform their duties safely and efficiently. Finally, defendants have not proved that it is impossi-

ble or impractical to deal with firefighters between sixty and sixty-five on an individualized basis.

In attempting to meet their burden, defendants first emphasize the arduous nature of firefighting duties and the physical demands of the job. They point out that the duties of firefighters include periods of relative inactivity followed by those of intense physical activity. During a fire, plaintiffs and other firefighters are exposed to intense heat (or in winter, extreme cold), must work in smoke-filled environments in the presence of toxic substances and must perform their duties under great stress.

In the absence of other evidence in the record, these facts might have significance. However, when the record as a whole is considered, this Court is satisfied that defendants have not met their burden of proving that all or substantially all employees of the Baltimore City Fire Department cannot safely and efficiently perform their demanding duties between the ages of sixty and sixty-five.

Insofar as five of the plaintiffs are concerned, this case involves their performance for a period of only five years, namely their ability to perform their duties adequately at ages sixty through sixty-four inclusive. Plaintiffs are not here challenging the right of the defendants to require their mandatory retirement at age sixty-five. That is the age when officers of the Fire Department must retire, and plaintiffs are not contending that they have the right under the ADEA to work as firefighters beyond that age.⁹ For these reasons, nothing in this Opinion should be construed as deciding

⁹ Indeed, plaintiffs' evidence indicates that officers regularly perform at fires the same duties as firefighters of lesser rank and, conversely, that firefighters undertake officers' duties in the absence of the latter. Essentially, plaintiffs are seeking in this case the same mandatory retirement age that the City applies to officers of the Fire Department.

whether the City of Baltimore has the right to require the mandatory retirement of Fire Department employees at age sixty-five.

The starting point in evaluating the job performance of Baltimore City firefighters after age sixty is the manner in which the plaintiffs themselves have performed since they attained that age. The evidence is overwhelming that plaintiffs have not only performed satisfactorily since they became sixty, but in most instances their performance has been more than satisfactory and even exceptional. Plaintiff Johnson is sixty-two years of age, plaintiffs Stern and Doyle are sixty-one and plaintiffs Paris and Robey are sixty. The evidence presented indicates that all five of these plaintiffs are today as qualified as younger employees of the Department to perform their duties as firefighters. Indeed, defendants have not sought to introduce any evidence to indicate that any one of the plaintiffs cannot carry out his assigned duties because of physical or other reasons. One Fire Department Captain testified that advancing age had not adversely affected plaintiff Stern's performance, and another Captain characterized Stern as being an "exceptional" firefighter today. Stern was rated as "outstanding" in his 1979-1980 performance evaluation report. Other evidence indicated that other plaintiffs were "good", "effective" or "very efficient" in the performance of their firefighting duties.

The testimony of firefighter Grove (who is not a plaintiff) supports that of the plaintiffs and of the Fire Department officers who evaluated plaintiffs' performances. Grove is sixty-nine years of age and will have been with the Department for thirty-nine years when he retires in August of 1981 at age 70.¹⁰ In a three-alarm fire that occurred in January 1981, Grove per-

¹⁰ Grove chose to remain a member of the ERS and is therefore not required to retire under City law until he becomes seventy years of age.

formed arduous firefighting duties over a period of four hours without difficulty. His testimony and that of the plaintiffs themselves supports this Court's findings on this record (1) that plaintiffs have performed their firefighting duties satisfactorily since they became sixty, and (2) that they may be expected to continue to so perform until they reach the age of sixty-five.¹¹

Defendants' argument that substantially all Baltimore City firefighters would be unable at age sixty to perform their duties safely and efficiently is undercut by the fact that historically Baltimore firemen have always worked past that age and even up to age seventy. As discussed herein above, the ERS, established in 1925, did not require retirement until the age of seventy. Even when the FPERS became effective in 1962, many firefighters, like the witness Grove, chose to remain covered by the earlier system and, like Grove, have continued to perform their duties satisfactorily after they reached the age of sixty. This continued employment of firefighters beyond the age of sixty has in no way affected the high caliber of the services performed by the Baltimore City Fire Department. As Chief O'Connor testified, the Baltimore City Fire Department, prior to 1962, was rated as one of the best in the country, and it continues to be so rated. It is difficult to understand how such a rating could have been achieved if all or substantially all of the Department's firefighters over the age of sixty cannot now and could not for many years in the past perform their duties safely and efficiently.¹²

¹¹ Plaintiff Robey was actively engaged in fighting a major fire between 12:00 midnight and 7:00 A.M. on April 24, 1981, which was only three days before this case came on for trial.

¹² At the present time, there are eight City firefighters who are between the ages of sixty and seventy, and sixty-five who are between the ages of fifty-five and fifty-nine.

The further question raised is why an effort was not made at an earlier date to fix a retirement age of sixty, if the risk to the public was as great as defendants now contend. If anything, the burdens undertaken by an older firefighter are less today than they were in prior years. In 1953, firefighters worked a 66-hour week, but this has been reduced over the years to the present 48-hour week. Moreover, technological improvements over the years, including in particular the widespread use of oxygen breathing apparatus,¹³ have made the job less onerous for both older and younger members of the Department.

Defendants' selection of the arbitrary age of sixty for the mandatory retirement of Baltimore firefighters is particularly suspect in view of what other municipal fire departments have done. A survey of the mandatory retirement ages of fire department personnel in thirty of the largest cities in the United States indicates that only four cities have a mandatory retirement age of sixty. Twenty-two cities have a retirement age of sixty-five or older or have no mandatory retirement age at all for firefighters.¹⁴ Nothing in the record indicates that Baltimore Fire Department personnel perform duties any more arduous than those undertaken in other cities. To accept defendants' contention that substantially all firefighters above age sixty cannot safely and effectively perform their duties would indicate that a large number of fire departments across the country are inadequately or improperly manned.

Defendants rely very heavily in this case on the medical evidence they have produced. Defendants argue

¹³ This apparatus is designed to protect firefighters from smoke, carbon monoxide and other harmful gases at the scene of a fire.

¹⁴ Three cities require retirement at age sixty-three or sixty-four. Baltimore was the only city with a fifty-five year old retirement age for firefighters.

that disease processes in persons aged fifty-five or older preclude the safe and efficient performance of their duties by firefighters over that age and that these medical conditions cannot be ascertained by means other than knowledge of the individual's age. It is asserted that the mandatory requirement of City law that firefighters retire at age fifty-five or sixty is based on sound physiological and medical data and is the most reliable way to remove firefighters with coronary disease from the Fire Department. Defendants contend that the expert testimony presented by them proves that it is impossible or highly impractical to deal with the retirement of Baltimore City firefighters over sixty on an individual basis.

On the record here, this Court finds and concludes that defendants have not met their burden of proving that it is impossible or highly impractical to deal with the retirement of Baltimore City firefighters between the ages of sixty and sixty-five on an individualized basis. As to this issue, the expert testimony presented by plaintiffs was much more convincing than that of defendants. In particular, this Court found Dr. Samuel M. Fox, III to be a most impressive witness, and his testimony will be credited in substantial part. Dr. Fox is an experienced cardiologist who specializes in exercise testing.¹⁵ He testified that the chronological age of an individual must of course be considered but that it is not determinative of that individual's ability to perform duties such as those required of a firefighter. Rather, exercise tolerance tests, supplemented by other tests and procedures if necessary, should be and can be used to determine whether a firefighter is physically and

¹⁵ Dr. Fox is a Professor of Medicine at Georgetown University School of Medicine, was formerly a member of the President's Council on Physical Fitness and Sports and is a past President of the American College of Cardiology. These are only a few of his many accomplishments.

medically fit to perform his duties. Because of technological improvements in recent years, physicians can today much more readily test for cardiological problems which a fireman or other similar worker might have.

The testimony of Dr. Fox is supported by that of both Dr. Paul O. Davis¹⁶ and Dr. Ellsworth R. Buskirk.¹⁷ Neither of these witnesses is a physician, but both have extensive experience in exercise physiology. This Court accepts their testimony that age should not be the determining factor in ascertaining whether an individual between sixty and sixty-five is capable of performing physical tasks such as those required of a firefighter.¹⁸ These witnesses conceded that increasing age unquestionably has an effect on physical performance and that aerobic capacity decreases with age.¹⁹ But decreasing physical ability is offset by the experience and knowledge which an older employee has gained over the years. An older, more experienced firefighter is better equipped to pace himself and is more knowledgeable concerning unnecessary risks than the younger. Indeed, the evidence in this case indicates that younger firefighters receive more physical injuries than do older ones, apparently because younger firefighters assume more unnecessary risks.

¹⁶ Dr. Davis is particularly well qualified to testify concerning the duties required of a firefighter. He has been an active member of the Takoma Park (Md.) Fire Department since 1966.

¹⁷ Dr. Buskirk is a Professor of Applied Physiology at The Pennsylvania State University.

¹⁸ It was Dr. Davis' opinion that it is both possible and practical to determine plaintiffs' capacity and ability to continue to perform their jobs safely and efficiently by means of medical examinations, periodic reviews of current job performance and other objective tests.

¹⁹ After age seventy, deterioration in physical performance is more rapid. This fact has little significance in this case.

Plaintiffs' expert witnesses also readily concede that firefighters as a class are particularly subject to heart disease and that the risk of heart disease increases with age. But facts such as these do not under the ADEA permit defendants to stereotype City firefighters between the ages of sixty and sixty-five and conclude that all or substantially all of them are no longer capable of performing their assigned duties safely and efficiently. As the Court said in *Aaron v. Davis*, 414 F.Supp. 453 (E.D.Ark.1976), at page 461:

Generally, it is the relative ease with which possibly incapacitating defects are detectable that determines whether the qualifications imposed by the employer are job-related or "reasonably necessary to the normal operation of the particular business," as provided in the Act. In this area, a claim for exemption from the statute's proscriptions will not be permitted on the basis of the employer's *stereotyping assumption* that most, or even many, employees in a particular type of job become physically unable to perform the duties of that job after reaching a certain age. See *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969). (Emphasis added)

The ADEA recognizes that stereotyping assumptions of an employer are not acceptable unless it is impossible or highly impractical to deal with members of a given class on an individualized basis. As the testimony of plaintiffs' experts indicate, it is both possible and practical to determine whether an individual firefighter between the ages of sixty and sixty-five is physically disabled from performing his assigned duties. In most cases, the cost of such testing is not great, and some of this cost will be paid under the Fire Department Health Care Program. Conventional risk factors can first be determined by way of interviews, and, in many instances where recognized risk factors are absent, further testing would not be required. Where indicated by

the presence of one or more risk factors, a firefighter sixty years of age or older can take an exercise tolerance test (also referred to in testimony as an exercise stress test). As Dr. Fox testified, this is not an expensive test, and more expensive and more invasive testing mechanisms need be employed only in those instances where it is indicated that follow-up testing is required.²⁰

The expert testimony relied upon by the defendants was less convincing than that of the plaintiffs. Neither Dr. Albert M. Antlitz nor Dr. Earl W. Ferguson has the experience that Dr. Fox has had in both cardiology and exercise tolerance testing. In his testimony, Dr. Antlitz indicated that he himself had examined a sixty-three year old officer of the Fire department to determine whether that individual should be retired. Following his examination of sixty-three year old Fire Lieutenant Anthony Y. Herr in 1978, Dr. Antlitz concluded that the cardiac status of this Fire Department officer, who had stopped working because of hypertension, would permit him to engage in his usual work as an officer with a truck company. However, at the trial, Dr. Antlitz testified that since 1978 he had learned what lieutenants now do in fire companies and that today he would not let Lt. Herr go back to fighting fires at age sixty-three. Thus, defendants' own evidence indicates that Fire Department personnel with cardiac problems can be evaluated on an individualized basis and retired if necessary. Other evidence in the record shows that examinations of the sort described by Dr. Antlitz (and testing, if necessary) could be successfully performed for plaintiffs and other firefighters between sixty and sixty-five years of age.

²⁰ These more expensive and more invasive follow-up tests include radionuclide imaging and cardiac catheterization.

Dr. Alexander R. Lind, a physiologist called to testify by defendants, based his conclusions that substantially all firefighters over fifty-five could not properly perform their duties in large part on his study of miners in South Africa.²¹ Such individuals hardly composed an appropriate class for comparison with Baltimore City firefighters, since all of the miners studied were black and worked full eight-hour shifts in mines where it was very humid and where the temperature ranged from 85° to 100°.

What the ADEA requires in a case involving municipal workers like firefighters is a balancing of the right of each individual employee to continue to work in spite of his age against the risk to the public and to other employees created by the nature of the duties to be performed. As the Court said in *Aaron v. Davis, supra*, at 461:

It is apparent that the quantum of the showing required of the employer is inversely proportional to the degree and unavoidability of the risk to the public or fellow employees inherent in the requirements and duties of the particular job. Stated another way, where the degree of such risks is high and methods of avoiding same (alternative to the method of a mandatory retirement age) are inadequate or unsure, then the more arbitrary may be the fixing of the mandatory retirement age.

In support of its conclusions in this case, this Court would cite and rely on both *Aaron v. Davis, supra* and *EEOC v. City of St. Paul, supra*. Both of those cases dealt with the rights of firefighters under the ADEA. In *Aaron*, an ordinance of the City of Little Rock re-

²¹ Dr. Lind testified in *Houghton v. McDonnell Douglas Corporation, supra*. In reversing the District Court's conclusion that defendant had met its burden in that case, the Eighth Circuit characterized the Company's evidence as being "of a general nature."

quired that all members of the fire department retire at age sixty-two. Following a trial, Chief Judge Eisele concluded that the record did not support the special relevance of the age sixty-two mandatory retirement requirement of the Little Rock ordinance. Accordingly, the Court held that the provisions of the ordinance in question were arbitrary, capricious and wholly lacking in any justifiable business necessity. 414 F.Supp. at 463.

In *City of St. Paul, supra*, a Minnesota statute and an ordinance of the City of St. Paul had established a mandatory retirement age of sixty-five for all uniformed fire department employees. Following a trial, District Judge Alsop held that provisions of this legislation requiring Fire Chiefs to retire at age sixty-five violated the ADEA. Noting that the only Chief over age sixty-four about whom testimony had been presented could adequately perform his duties, the Court found that the evidence in the case did not give the City of St. Paul a factual basis for believing that substantially all Chiefs were unable to perform their duties safely and efficiently after the age of sixty-four. 500 F. Supp. at 1145.

In *City of St. Paul*, the Court upheld the challenged legislation insofar as it required the retirement of firefighters and captains at age sixty-five. 500 F.Supp. at 1144. Defendants argue that this part of the decision supports their contention that age is a BFOQ for firefighters. This Court would disagree. There is no inconsistency between this Court's decision that defendants have not on the record here met their burden of proving that retirement at age sixty is a BFOQ for firefighters and Judge Alsop's conclusion that the defendants in *City of St. Paul* had met their burden concerning such compulsory retirement at age sixty-five. Certainly as an employee's age increases, there is a decrease in the quantum of proof necessary for an em-

ployer to meet its burden of proving a BFOQ under § 623(f)(1). *Aaron v. Davis*, *supra* at 461. Plaintiffs have not in this case (as did the plaintiffs in *City of St. Paul*) sought to work beyond age sixty-five. Nothing contained herein is intended to suggest that Baltimore firefighters could not be required by the City to retire at age sixty-five, since that question is not before the Court in this case. The issue here has been whether defendants have met their burden of proving that retirement at age sixty is a BFOQ for City firefighters. This Court finds that they have not.

In sum, the Baltimore City law in question, as applied to these plaintiffs and others like them, violates the ADEA because it sets an arbitrary age limit for terminating the plaintiffs' employment. As they have done all their lives, plaintiffs keenly wish to continue to work as firefighters until they are sixty-five. Section 34(a) does not permit plaintiffs' performance to be measured in terms of their ability. Rather, an arbitrary line has been drawn based on stereotyped assumptions. Plaintiffs have been told that solely because of their age, their services are no longer required. In this case, defendants have failed to meet their burden of proving that, when a firefighter becomes sixty, age is an occupational qualification reasonably necessary to the normal operation of the Baltimore City Fire Department. The provisions of § 34(a)(2) and (4) of Article 22 of the Baltimore City Code, as applied to plaintiffs and others like them, therefore violate the ADEA.

VII

The claim of plaintiff Porter

Plaintiff Porter is the only one of the six plaintiffs in this case who was not employed by the Fire Department on July 1, 1962. Under § 34(a)(2), he must therefore retire at age fifty-five. Defendants contend that since plaintiff Porter is presently thirty-two years of age, he is not a proper plaintiff in this suit.

Defendants argue that plaintiff Porter is not one of those persons protected by the ADEA, since the prohibitions of the Act are limited "to individuals who are at least forty years of age but less than seventy years of age."²² 29 U.S.C. § 631. However, when read together with the rest of the statute, this provision does no more than define the acts prohibited by the statute and would not deprive plaintiff Porter of standing in this case. If Porter survives and is still employed by the Fire Department when he attains the age of fifty-five, he will clearly be protected by the Act. More importantly, since this Court has found that the provisions of § 34(a) which mandate retirement of a City firefighter at age sixty violate the ADEA, *a fortiori* the provisions of the legislation which mandate that plaintiff Porter must retire at age fifty-five are likewise invalid.

The essential question which must be addressed in determining whether plaintiff Porter has standing is whether his claim is now ripe for adjudication. Defendants assert that since Porter will not have to retire until the year 2003, his claim is too speculative to be considered by this Court at this time. Relying on *Eccles v. Peoples Bank*, 333 U.S. 426, 68 S.Ct. 641, 92 L.Ed.2d 784 (1948), defendants argue that there are many contingent events which might occur before plaintiff Porter is required to retire, and that the occurrence of any one of these events would render moot any decision made by this Court as to him.

When the legislation in question is considered from a practical point of view, this Court concludes that abstract concepts of justiciability should be disregarded. This suit challenges provisions of § 34(a) of Article 22 of the Baltimore City Code. Two groups of employees are affected by the legislation, those who joined the Fire Department prior to July 1, 1962 and those who, like

²² The 1978 amendments to the Act increased the top age limit from sixty-five to seventy.

plaintiff Porter, began their employment after that date. The provisions of the law applying to these two separate groups are hardly severable. Quite obviously, if the ADEA invalidates provisions of the City Code which require mandatory retirement of a firefighter at age sixty, that Act likewise invalidates similar provisions mandating retirement at age fifty-five. The principle of statutory severability plays a special role when a court is presented with questions of ripeness. *See* Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3532 at 258 (1975). Inseverability, therefore, may make ripe issues that otherwise would be better deferred. *Id.* at 259; *see Carter v. Carter Coal Company*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936). As the Court of Appeals of Maryland said in *Heubeck v. Mayor and City Council of Baltimore*, 205 Md. 203, 211, 107 A.2d 99 (1954), an Act must fall entirely if the effect of declaring a portion of it invalid would render the remainder incapable of effecting the purpose for which the Act was enacted.

Under the particular circumstances of this case, considerations of judicial economy lead this Court to the conclusion that plaintiff Porter's claim is ripe for determination at this time. It would make little sense, in view of the findings and conclusions made herein, to defer consideration of Porter's claim until a later date. Accordingly, plaintiff Porter is entitled to a declaratory judgment and injunction prohibiting defendants from enforcing provisions of § 34(a) which mandate that he must retire at age fifty-five.

VIII

Plaintiffs' other claims

In view of this Court's conclusion that § 34(a)(2) and (4) of Article 22 of the Baltimore City Code violates provisions of the ADEA, it is not necessary to determine whether this City law likewise contravenes 42 U.S.C. § 1983 and the Fourteenth Amendment. How-

ever, it should be noted that the Fourth Circuit's decision in *Arritt v. Grisell*, *supra*, makes it very doubtful that plaintiffs would prevail insofar as their alternative claims are concerned.

In the second part of the *Arritt* opinion (567 F.2d 1271-1272), the Fourth Circuit upheld the District Court's granting of summary judgment in favor of the defendants as to plaintiff's claim that the West Virginia statute violated § 1983 by denying the plaintiff's right to the equal protection of the laws. Relying on *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976), the Fourth Circuit concluded that it could not be said that the age limitation contained in the West Virginia statute did not rationally further a legitimate state purpose insofar as the claim based on the equal protection clause, as distinguished from the statutory claim under the ADEA, was concerned. As Judge Thomsen pointed out, there is no inconsistency in concluding that a statute violates the ADEA but does not violate the Equal Protection Clause of the Fourteenth Amendment, since legislation "authorized by § 5 of the Fourteenth Amendment can prohibit practices which would pass muster under the Equal Protection Clause, absent an act of Congress." 567 F.2d at 1272.

In any event, in this case, it is not necessary to consider in detail the arguments presented by the plaintiffs in seeking to distinguish this case from *Arritt* and *Murgia*. Plaintiffs are entitled to the relief they seek under the ADEA, and there is therefore no need for this Court to go on and undertake to analyze the evidence in terms of plaintiffs' claims asserted under § 1983 and the Fourteenth Amendment.

IX

Conclusion

For the reasons stated, plaintiffs are entitled to the relief they seek. Plaintiff Johnson is entitled to a judg-

ment in the amount of \$1,000.00, representing back pay due him from May 1 to June 11, 1979. All plaintiffs are entitled to a declaratory judgment, a permanent injunction and costs. In addition, plaintiffs are entitled to attorneys' fees in an amount to be determined by the Court at a later date. Counsel should meet and undertake to agree on the form of an Order to be entered herein.

2 2
No. 84-518, No. 84-710

Supreme Court, U.S.
FILED

DEC 3 1984

IN THE

Supreme Court of the United States
ALEXANDER L. STEVAS

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL.,
Petitioner,
v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,
v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

BRIEF OF RESPONDENTS IN OPPOSITION

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November, 1984

**Counsel of Record*

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Do the provisions of Baltimore's retirement ordinance pertaining to mandatory retirement of firefighters satisfy a reasonable federal standard under this Court's ruling in *EEOC v. Wyoming*?

2. Where a municipality, pursuant to its obligation to protect the safety of its citizens, imposes an age 55 BFOQ on its firefighters, what standards govern the review of that BFOQ by a trial court evaluating an ADEA Section 4(f)(1) defense?

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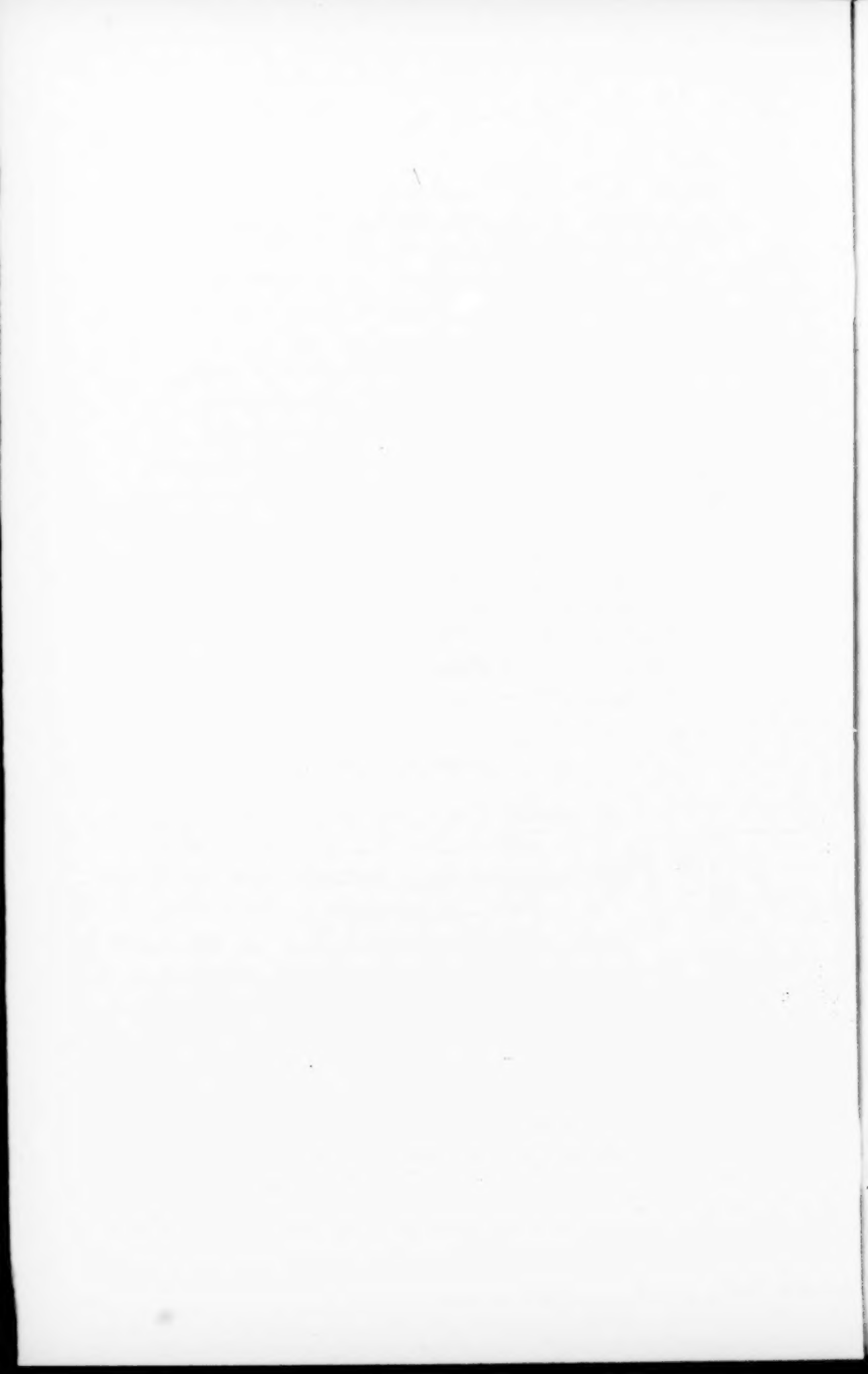
Rules and Regulations

29 C.F.R. Section 860.102 (1981)	7
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Miscellaneous

5 Cong. Rec. H2276 (daily ed. March 21, 1978)	9
17 Cong. Rec. E5875-6 (daily ed. Sept. 26, 1977)	9
Hearings on H.R. 9281 before the Subcommittee on Compensation and Employee Benefits of the Senate Committee on Post Office and Civil Service, 93rd Cong., 2d Sess. (April 24, 1974)	8
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<i>Special Retirement Policies as Related to Mandatory Retirement for Law Enforcement Officers, Firefighters and Air Traffic Controllers</i> , Subcommittee on Compensation and Employee Benefits of the Senate Committee on Post Office and Civil Service, 95th Cong., 2d Sess. (October 5, 1978)	9
Dr. Robert A. Bruce, <i>Value of Maximal Exercise Tests in Risk Assessment of Primary Coronary Heart Disease in Healthy Men: Five Years' Experience of the Seattle Heart Watch Study</i> , American Journal of Cardiology, Vol. 46, Sept. 1980, p. 371 ..	14



No. 84-518, No. 84-710

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL.,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

BRIEF OF RESPONDENTS IN OPPOSITION

Respondent Mayor and City Council of Baltimore respectfully prays that the Petition for a Writ of Certiorari of Robert W. Johnson, et al., (the individual petitioners) and the Petition for a Writ of Certiorari of the Equal Employment Opportunity Commission (EEOC) be denied.

COUNTERSTATEMENT OF FACTS

The Mayor and City Council of Baltimore ("Baltimore") has been in the vanguard in protecting its employees from the effects of arbitrary age discrimination. Baltimore's retirement legislation reflects sound and farsighted judgment, and the resulting retirement ordinances contain legislative determinations ultimately adopted wholecloth by our national government.

In the early 1900's, it was an article of faith throughout this country that an employee's productive life ended at

age 65, the age at which retirement was permitted (or required) under the laws of this nation and other western countries. Baltimore shattered this "stereotypical assumption" in 1926 when it adopted the Employees Retirement System of Baltimore (the "ERS"). Baltimore City Code, Article 22, Sections 1-16, 42-43. Baltimore's legislature investigated the issues, and determined that the national assumption was wrong — there was sound justification for allowing employees to continue at work until age 70. Thus, despite the ubiquitous limit of age 65, Baltimore reached the legislative judgment that employees should be allowed to work until age 70; a legislative judgment shared by our national government fifty-two years later.

It was from the ERS plan, which permitted (and today permits) an employee to work until age 70 that the Fire and Police Employees Retirement System of Baltimore (FPERS) was cleaved. Baltimore City Code, Article 22, Sections 29 *et seq.* The FPERS, which contains the mandatory retirement provisions at issue here, was created at the demand of the firefighters and police officers — the contemporaries of the individual petitioners (except Porter). In fact, the petitioners and their cohorts approved the adoption of the FPERS by an affirmative vote.

The fight by police and fire unions to remove themselves from the ERS began in the 1950's, when the firefighters' union complained to Baltimore that the plan was not responsive to their special needs. According to the uncontradicted evidence before the district court, the police and fire unions produced persuasive evidence before Baltimore's City Council that the average firefighter or law enforcement officer was dying before he had the chance to retire under the ERS. The firefighters proved that, according to the mortality studies, the average member of the ERS who was in the fire service would die

at age 59 — before the earliest age of voluntary retirement in the ERS, which is age 60. The union complained bitterly that the average firefighter would be employed for his entire working life in the Baltimore City Fire Department, and, because of the rigors and hazards of his job, was deprived of the opportunity to enjoy even the briefest period of retirement.

Baltimore's Fire Chief, Peter O'Connor, Jr., rose through the ranks from firefighter to chief of the department in the course of his 27 years with the Baltimore City Fire Department. Chief O'Connor testified before the district court that as a young firefighter, he was keenly aware of the deficiencies of the ERS as a retirement plan for firefighters. In his words, "[The proponents of the new pension plan] had mortality tables at that particular time that indicated that firefighters on an average were succumbing at the age of 59, which theoretically meant that they would never live to enjoy their retirement benefits, which were predicated on age 60, and if you had not achieved the age of 60 under the old ERS benefits, there was a drastic reduction for each year prior to your reaching the mandatory retirement age, even if you satisfied the requirement [of] 30 years, if you were [a Plan] A member . . . or whether you satisfied the 32 and a half year requirement of the [Plan] B system." Transcript, p. 763, Joint Appendix, p. 731. To protect the citizens of Baltimore and the firefighters themselves, the union argued, it was necessary to require retirement at age 55.

Charles L. Benton, Baltimore's Director of Finance, was one of the four persons appointed to investigate the deficiencies of the ERS. Mr. Benton testified that "[T]he Board of Estimates appointed our committee out of a growing concern by the city as well as the fire unions, Firefighters Association and Fire Officers Association, of

the number of injuries that was being experienced, the number of disabilities and the number of deaths that were related to fire suppression activities, not only a concern for the welfare of these individuals but a concern about the public generally." Despite the additional cost of one and one-half million dollars annually, Baltimore adopted the new retirement provisions "because of . . . compassion and because of the the safety of the individuals performing these tasks as well as the general public welfare." Transcript. p. 958, Joint Appendix, p. 918.

Baltimore's response to this legislative investigation was to create the most liberal retirement system in the State of Maryland, structuring benefits for protective service occupations so that retirement would occur for these employees several years before the average date of death. The age of 55 was selected on the basis of the information provided to Baltimore by the affected employee unions, and the benefits were elevated to ensure that similarly situated employees were treated equally across the board. The age of earliest elective retirement was lowered to age 50.

In 1974, the Congress established a mandatory retirement age of 55 for, *inter alia*, federal firefighters. The legislative history reveals that Congress made identical legislative findings with respect to federal firefighters. That same year, Congress extended the Age Discrimination in Employment Act, 29 U.S.C Section 21 et seq., to political subdivisions.

Shortly after the 1979 amendments to the ADEA took effect, which amendments prohibited a plan from including a mandatory retirement age unless it was a bona fide occupational qualification (BFOQ) under Section 4(f)(1), the firefighters' union — the very entity which demanded the FPERS in 1962 — sponsored this civil action on behalf of the individual petitioners.

In addition to the legislative history set forth above, all parties produced expert testimony before the trial court. All experts expressing opinions recognized that heart disease is the number one killer in this country; that firefighters suffer from heart disease at twice the rate of the general population; that in a significant number of cases, the first symptom of heart disease is death; that of ten or so readily measurable traits, age less than 55 versus age greater than 55 is the *only* statistically significant predictor of heart disease¹; that aerobic capacity (stamina) declines linearly and inexorably with age; that the physical status of firefighters can be correlated to the general population (i.e., that on average, a firefighter is not better conditioned or healthier than anyone else his age); that merely wearing the protective gear of firefighters consumes almost one third (27%) of a person's aerobic capacity; that firefighting involved near maximal exertion for protracted periods of time under profound threats to the person, such as emotional stress, extremes of temperature, the presence of poisonous gasses such as carbon monoxide and other combustion products; and that testing the physiological parameters such as stamina, sight (visual acuity and dark adaptation), reaction time, hearing, thermoregulation and so forth under conditions of smoke, heat, and oxygen deprivation was, in the words of Baltimore's expert, "[w]ithin the wit of mankind." There was sharp disagreement on whether this kind of testing was practical, safe or reasonable. There was testimony that by administering a battery of cardiological tests, predictions about a firefighter's future cardiovascular health could be made.

¹ Plaintiffs' Exhibit 24(e), the graph reproduced in the Appendix indicates, across the top, that the probability these data result from chance (p) is less than 0.05. There is a statistically significant relationship between age less than 55 or age 55 or greater and the incidence of coronary death, saphenous vein (bypass) grafting, etc.

According to Chief O'Connor, "without a doubt" the work of a firefighter has become much more arduous since the adoption of the FPERS in 1962. Transcript, p. 763, Joint Appendix 733. There has been a reduction in the number of first line firefighting units. The weight of the breathing apparatus has increased sevenfold. Transcript, p. 722, Joint Appendix, p. 740. There is not a company in the City which has not had a fourfold increase in their number of responses per year, and some of the companies have actually increased as much as eightfold. Transcript p. 676, Joint Appendix, p. 735. Chief O'Connor further testified that three firefighters, supervised by an officer, are now required to do the same work which previously had been done by five firefighters, supervised by an officer. Transcript, p. 884, Joint Appendix, p. 801.

According to Chief O'Connor, "when it comes to doing the overhaul operations,² when it comes to readying the apparatus, when it comes to who's going to run up in the tower and run back down, climb that 50 or 60 feet, that's generally a younger man's job, and it's been that way ever since I've been in the department." Older men move into the slower moving companies, and their younger counterparts "look out" for them.

REASONS FOR DENYING THE WRIT

At the outset it should be noted that this case deals only with public servants whose sole function is to protect the

² "Overhauling" or "sparking" is the process whereby an extinguished structure is partly razed after a fire is "knocked down," i.e., ceilings are pulled down and interior walls are knocked out to ensure that smoldering embers do not reignite. Because this work is very strenuous, and because there is no apparent danger, firefighters, including the petitioners, often remove their air masks. Combustion often continues though, and firefighters who are doing this strenuous work breathe carbon monoxide, a colorless and odorless poison which can precipitate heart attacks.

public from the tragedy of fire. These few employees are on the very cutting edge of public safety; there is precious little in the operation of Baltimore's fire department that is not dictated by necessity. Other cases cited relating to piloting aircraft, law enforcement and inter city bus driving pertain to occupations which are much less demanding than firefighting. Those jobs involve preparedness for emergency situations, whereas firefighting is almost nothing but emergency response. A firefighter guiding a pumper down ice slicked roads or wrestling an eighty eight thousand pound "snorkel" fire truck³ through congested city streets uses the same intensity and brute force whether responding to a false alarm or a three-alarm high-rise hotel fire. Avoiding hazardous situations, making snap emergency judgments, and using supreme physical force to save lives are not remote contingencies, but are constant challenges which must be fought and won every day. Failure to meet these challenges results in serious injury to the public or other firefighters, or, if Baltimore is fortunate, just the destruction of personal property. *If firefighting in Baltimore's metropolitan area does not warrant a reasonable BFOQ under the ADEA, then the BFOQ defense does not exist.*

THE CIRCUIT COURT CORRECTLY DETERMINED THAT RELEVANT FEDERAL STATUTORY PROVISIONS SET REASONABLE FEDERAL STANDARDS AGAINST WHICH TO JUDGE BALTIMORE'S RETIREMENT ORDINANCE.

Twenty-nine C.F.R. Section 860.102 provides the following illustration of BFOQs: "Federal statutory and regulatory requirements which provide compulsory retirement, without reference to the individual's actual physical condition at the terminal age, when such conditions are clearly imposed for the safety and con-

³ Some of these vehicles are not equipped with power steering, and driving fire apparatus is so strenuous that the union won additional compensation for the drivers. Transcript, p. 780, Joint Appendix, p. 748.

venience of the public." Obviously, the BFOQ test *may* consist of the two-prong test of *Arritt v. Grissell*, 561 F.2d 1267 (4th Cir. 1977), but it is equally clear from this language that BFOQs are not limited just to that test. Such statutory and regulatory provisions are "reasonable federal standards" in keeping with this Court's decision in *EEOC v. Wyoming*, 460 U.S. 228 (1983).⁴

Regarding the mandatory retirement of federal firefighters and police officers codified as 5 U.S.C. Section 8335(b), Senator Percy stated, "It is the intent of this legislation to help federal law enforcement and firefighters agencies maintain a relatively young, vibrant, and effective work force, both for the safety of the individual officers and for the society which they serve." Hearings on H.R.9281, Before the Subcomm. on Compensation and Employee Benefits of the Sen. Comm. on Post Office and Civil Service, 98rd Cong., 2d Sess. (April 24, 1974). "The history of retirement legislation dealing with law-enforcement officers and firefighters shows Congressional intent to liberalize retirement provisions so

⁴ EEOC intimates in its petition that this Court's opinion in *Wyoming* is authority that federal statutes may not be BFOQs under the ADEA. *Wyoming* was EEOC's direct appeal of the grant of Wyoming's motion to dismiss on Tenth Amendment grounds. The instant case was on appeal to the Fourth Circuit at the time, and Baltimore petitioned for certiorari before judgment so that this Court might have the benefit of an example of the application of BFOQ standards to a factual record. EEOC and the individual petitioners opposed the petition, and it was denied.

EEOC's reason for opposing Baltimore's petition was that since Wyoming had not asserted that the mandatory retirement age was a BFOQ within the meaning of Section 4(f)(1), *EEOC v. Wyoming*, *supra*, Brief for the Equal Opportunity Commission, p. 10-11, n.4, Baltimore's request to examine the BFOQ issue was an "attempt to broaden the question presented in *EEOC v. Wyoming*." *Mayor and City Council of Baltimore v. Johnson, et al.*, Pet. Docket No. 81-1112 (October Term, 1981), Brief for Equal Opportunity Commission in Opposition, p. 9. The matter of the BFOQ defense was not before this Court in *Wyoming*, perhaps in part because of EEOC's opposition.

as to make it feasible for these employees to retire at age 50. This intent has been based on the nature of the work involved and the determination that these occupations should be comprised, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing than most in the Federal Service." S. Rep. No. 93-948, 93rd Cong., 2d Sess. (1974), p. 2. Federal firefighting may be as much as thirteen times safer than state or local firefighting. *Special Retirement Policies as Related to Mandatory Retirement for Law Enforcement Officers, Firefighters and Air Traffic Controllers*, Subcomm. on Compensation and Employee benefits of the Sen. Comm. on Post Office and Civil Service, 95th Cong., 2d Sess. (October 5, 1978), p. 13.

Throughout the legislative history of the ADEA, Congress was careful not to put "a straight jacket on endeavors which have a safety involvement." Hearings on Retirement and the Individual before the Senate Select Committee on Aging, 90th Cong. 1st Sess. at 103-104 (remarks of Senator Pell). Representative Weiss referred to the bona fide occupational qualification as applying "to the area of hazardous occupations" and as "exempting workers in hazardous occupations from the protections of the Act." 17 Cong. Rec. E5875-6 (daily ed. Sept. 26, 1977) (remarks of Rep. Ted Weiss). In considering the 1978 amendments to the ADEA, Representative Weiss repeated these remarks. 5 Cong. Rec. H2276 (daily ed. March 21, 1978).

It is clear that the Congress made legislative findings which parallel those made by Baltimore more than a decade earlier. Other language quoted by the Fourth Circuit is even more explicit regarding the Congressional intent underpinning the federal mandatory retirement law. 731 F.2d at 212-3. If there is any difference at all between the process Baltimore used to establish its mandatory retirement age, and the process used by

Congress to arrive at the same judgment, it is that Baltimore's conclusion is better grounded in fact, and more warranted by the exigencies of the work.

THE CONFLICT IS OVERSTATED

A conflict among the circuits will not justify review unless it is "real and embarrassing." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955), quoting *Layne and Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). There is no such conflict here, and to the extent that differences existed between the circuits after the *Wyoming* decision, they are quickly being eliminated. Cases decided before *Wyoming*, such as the district court's opinion below, impose an impossible burden on political subdivisions, because district courts found that, no matter how expensive, dangerous or convoluted a given testing procedure was, its mere existence destroyed the "reasonableness" of an employer's actions. Second, and more important, the early opinions of *Arritt v. Grissell*, 567 F.2d 1267 (4th Cir. 1977), *Orzel v. Wauwatosa*, 697 F.2d 743 (7th Cir. 1983) and *Touhy v. Ford Motor Company*, 675 F.2d 842 (6th Cir. 1982) reverse district courts where BFOQs were found to exist based upon affidavits and legal conclusions without relating the employer's practices to "reasonable federal standards." The individual petitioners place much reliance on the fact that the Fourth Circuit distinguished its BFOQ analysis from the holdings in *Arritt*; a position which boils down to the complaint that certiorari review is warranted when a Circuit revises its own rulings. Petition for a Writ of Certiorari in No. 84-518, pp. 5-6. Furthermore, *EEOC v. Missouri State Highway Patrol*, ___ F.2d ___, Case Nos. 83-1287, 83-1850 (8th Cir. Nov. 12, 1984), supports the Fourth Circuit's theory in this case.

THE NINTH CIRCUIT

Petitioners cite *EEOC v. County of Los Angeles*, 706 F.2d 1039 (9th Cir. 1983), *cert. denied* 104 S. Ct. 984

(1984), as authority that the Ninth Circuit is at conflict with the decision here. The Ninth Circuit has recently revised its view, and adopted a position remarkably consistent with the Fourth Circuit's reasoning here. In *Gathercole v. Global Associates*, ___ F.2d ___ (9th Cir. 1984), 34 FEP Cases 502, the Ninth Circuit reversed the judgment of the district court that the employer was liable under the ADEA for terminating the plaintiff's employment as a pilot under the FAA's "Age Sixty Rule." The plaintiff was employed as a pilot on aircraft which were not designated as "commercial," and therefore operation of the aircraft was not regulated by the "Age Sixty Rule" contained at 14 C.F.R. Part 11. See *Gathercole v. Global Associates*, 545 F. Supp. 1280 (N.D. Cal. 1982) at p. 1282. The district court took the same position as the EEOC here, that other federal policies were reviewed simply under an "arbitrary and capricious" standard, and did not affect the duties of private employers. The Ninth Circuit rejected this argument, and ruled "*as a matter of law*" that Global's actions in discharging Gathercole met the standard for exculpation established by the BFOQ provisions of the ADEA. *Id.*, FEP Cases 503 (Emphasis in original). This case is noteworthy because it did not involve a governmental employer, and therefore did not raise the constitutional issues found by the Fourth Circuit in this case.

THE SEVENTH CIRCUIT

In the Seventh Circuit, the Court of Appeals has recently held that proof of a parallel federal provision is a form of evidence upon which an employer might rely to justify its practices. *Heiar v. Crawford County*, ___ F.2d ___, Case Nos. 83-1872, 83-2149, 83-2166, 83-3139 (7th Cir. August 20, 1984). In the *Heiar* case, the Seventh Circuit stated that it was proper for an employer to introduce the legislative history of parallel federal provisions, because while "[l]egislative history is not a

conventional source of 'evidence'; . . . [t]he determination whether a particular retirement age is reasonably necessary is sufficiently remote from the usual kinds of factual determinations courts are called on to make justifies the broadest possible conception of what is 'evidence'." The court went on to hold that under the facts of that particular record before it, the legislative underpinnings of the parallel federal act, 5 U.S.C. Section 8335(b), were insufficient to warrant reversal of the district court because other facts demonstrated that the county had an insufficient interest in its mandatory retirement age. Rather than holding that the rationale used by the Fourth Circuit was inherently wrong, the court concluded that in the case before it, the evidence "belies any claim that the county thinks the sheriff's department should be composed of "active, vigorous, physically capable men [as stated in the legislative history behind U.S.C 8335(b)]."

Another key distinction between the *Heiar* case and this one is that in *Heiar*, there is no indication that the court had before it the legislative history of the *county's* ordinance. The legislative history of Section 8335(b) is well known, and the reasons for establishing the age 55 limit in that statute are clear. In the instant case, it is beyond question that Baltimore's retirement provisions were good faith legislative judgments regarding how best to compensate employees while protecting the public. The absence that evidence in *Heiar* puts it on a lower plane than the instant case. What the Seventh Circuit will do in a case where the employer proves that its only real concern is the physical preparedness of its firefighters remains unsettled.

**THE JUDGMENT OF THE CIRCUIT COURT
SHOULD NOT BE DISTURBED FOR
OTHER REASONS**

The Fourth Circuit reversed the district court on but one theory presented; because it found that comparable federal

statutes were a reasonable standard against which to judge Baltimore's retirement ordinance, it did not reach other crucial grounds presented for reversing the district court. In order to do justice to the citizens of Baltimore, it is essential that if the Fourth Circuit's judgment is going to be reviewed, these other grounds must be examined. This is particularly true in light of the very recent case of *EEOC v. Missouri State Highway Patrol, supra*, in which the Eighth Circuit reversed identical factual conclusions of a district court predicated upon the testimony of the same expert witnesses offered by Baltimore.

While it is a general proposition that most inquiries related to the BFOQ should be adjudicated on a case by case basis, there are aspects of the evidence in these cases which are invariant. For example, the state of the art of cardiology is the same in Baltimore as it is in Missouri, and if it is impractical for the State of Missouri to test certain physical attributes, it should be no less impractical for a municipality like Baltimore. The expert testimony adduced in these cases is predicated upon the interpretation of a finite body of scientific research. The ability to test crucial physiological parameters should not be different in Baltimore than in Wyoming, and the impracticality of predicting cardiovascular status in Pennsylvania should not be any less impractical forty miles south in Baltimore.

The district court in the *Missouri State Highway Patrol* case was presented with the expert testimony of Dr. Albert Antlitz, cardiologist, and Dr. Alexander Lind, physiologist — the very same experts who testified for Baltimore below. The district court rejected the testimony of Drs. Lind and Antlitz, siding with the experts produced by the EEOC. The Eighth Circuit Court of Appeals reversed the district court's factual conclusions, finding that the district court was clearly erroneous when it ignored the testimony of Drs. Lind and Antlitz. The Eighth Circuit held that the State of Missouri had demonstrated a sufficient factual

basis for its mandatory retirement for the job of state trooper because the testimony of Drs. Lind and Antlitz, properly viewed, required a finding that the Patrol had proved that 1) all or substantially all of the members of the class above the mandatory retirement age would be incapable of performance, and 2) that there were cardiovascular traits which were untestable and which jeopardized safe and efficient performance. The evidence produced by the EEOC, and rejected by the Eighth Circuit, is *precisely the same* battery of tests as accepted by the district court in the instant case.⁵

It is unlikely that the state of medical knowledge *decreased* between the time Drs. Lind and Antlitz testified in Baltimore, and the time they testified in Missouri. Furthermore, in every case in which Drs. Lind and Antlitz have testified, the opinions have been accepted as fact, or adverse decisions have been reversed on appeal.

⁵ The district court in *Missouri Highway Patrol*, just like the district court below, relied upon the testing paradigm set forth in an article by Dr. Robert A. Bruce, *Value of Maximal Exercise Tests in Risk Assessment of Primary Coronary Heart Disease in Healthy Men: Five Years' Experience of the Seattle Heart Watch Study*, American Journal of Cardiology, Vol. 46, Sept. 1980, p. 371. In short, it attempts to assess cardiovascular status by measuring traditional risk factors such as age, exercise risk predictors, and ultimately, very sophisticated diagnostic procedures such as radioactive thallium-201 exercise myocardial perfusion imaging, radiotechnecium ventriculography, coronary catheterization, and coronary cineangiography.

The Eighth Circuit reversed the conclusion of the district court regarding the testability of coronary health, which conclusion was based upon testimony that, in the case of those who have no traditional risk factors "you can determine with a probability of .017 that in the next five years . . . that individual will not have a cardiovascular event . . ." *EEOC v. Missouri State Highway Patrol*, *supra*, slip op. at 16. This is exactly the same evidence accepted by the district court in the instant case. As perceptive as the Eighth Circuit's opinion is, the testing paradigm is more seriously flawed than the Court found.

The district court in the instant case was taken with one of plaintiffs' experts, who had not conducted research on his own in a decade. This expert, a Dr. Fox, testified chiefly about work done by Dr. Robert Bruce, from whose article is taken the graph which appears as Appendix 1a, *infra* (Plaintiffs' Exhibit 24(e), Joint Appendix, p. 1519). Dr. Bruce's article posits an experimental series of cardiovascular and physiological tests, which approach was credited by the district court in this case.⁶ However, when Dr. Bruce testified about this methodology against Drs. Lind and Antlitz before the trial court in *EEOC v. Wyoming*, No. C 80-0336B (D. Wyo. 1983) on remand from this Court the jury accepted the opinions of Drs. Lind and Antlitz that age 55 was a BFOQ for the job of game warden in Wyoming. Again, it is inconceivable that anyone would be more capable of explaining this complicated theory than Dr. Bruce, the researcher who created it.

Furthermore, no other court has credited Dr. Fox's theoretical views regarding the prediction of cardiac health. A district court in Pennsylvania has recently rejected Dr. Fox's testimony and held that age 60 was a BFOQ for the comparatively serene job of highway patrolman. *EEOC v. Commonwealth of Pennsylvania*, ___ F. Supp. ___, Case No. 83-0321 (M.D. Pa. Oct. 24, 1984).

Finally, the First Circuit has affirmed a district court's adoption of the opinion of Drs. Lind and Antlitz that age 50 is a BFOQ for the occupation of state police officer in Massachusetts. *Mahoney v. Trabucco*, 734 F.2d 35 (1st Cir. 1984), *petition for cert. filed*, No. 84-531. The district

⁶ The testing paradigm relates only to cardiovascular status. The panoply of other physical traits which deteriorate with age are not measured by this procedure. The district court below found that testing these other attributes, such as reaction time, vision, etc., under the simulated stresses of fire combat was practical, even though there was no testimony that such a battery even existed.

court's opinion below is clearly an anomaly among the cases across the country.

THE DISTRICT COURT'S PLAN IS UNSOUND

A particularly bizarre aspect of the district court's opinion relates to its findings on coronary artery disease. "Plaintiff's expert witnesses also readily concede that firefighters as a class are particularly subject to heart disease and that the risk of heart disease increases with age." 515 F. Supp. at 1298. The testimony below was that at age 55, about three-quarters of the average population has at least one significant coronary occlusion. Notwithstanding these concessions, which should have resulted in a judgment for Baltimore, the district court disregarded what petitioners set forth as the "proper" BFOQ test under *Armitt*, i.e., that there exists a trait within the class which is not subject to assessment by testing, and that the trait precludes safe and efficient performance. The district court quoted with approval language from *Aaron v. Davis*, 414 F. Supp. 414 (E.D. Ark. 1976) that it "is the relative ease with which possibly incapacitating defects are detectable which determines whether qualifications imposed by the employer are job related or "reasonably necessary to the normal operation of the particular business," as provided in the Act" 515 F. Supp. at 1299.

The district court found that a battery of tests, some contingent upon the results of others, makes unreasonable Baltimore's reliance upon a mandatory retirement age. These tests include exercise treadmill testing, radioactive thallium-201 exercise myocardial perfusion imaging, radiotechnecium ventriculography, coronary catheterization, and coronary cineangiography. In the one experiment which was done where testing, up to and including cardiac catheterization was performed, some firefighters died simply as a result of exercise treadmill

testing, and nearly 5% of the firefighters required cardiac catheterization. The district court's concept of what kind of testing is "relatively easy" eviscerates even what petitioners advance as the proper BFOQ. In comparison, the case of *Weeks v. Southern Bell*, 408 F.2d 228 (5th Cir. 1969), from which was taken the concept that a relatively easy test eliminated the employer's right to rely upon an assumption, involved an employer who assumed that women were incapable of lifting thirty pound objects. Comparing a requirement to test the ability to lift 30 pounds to the extensive battery of tests required by the district court is absurd.

Baltimore demonstrated that it has "a reasonable basis in fact" for its retirement provisions. That the district court found there might be a more perfect procedure should not eliminate Baltimore's BFOQ, even under the standards put forth by the petitioners. See *Western Airlines v. Criswell*, 709 F.2d 544 (9th Cir. 1983), cert. filed, No. 83-1545. Baltimore is unaware of anything in the legislative history of the ADEA which remotely suggests that employers are required to compel their employees to submit to this kind of dangerous and invasive testing at the peril of losing the right to rely upon a "reasonable general rule."

Finally, the district court totally ignored the legislative history of Baltimore's FPERS. There is no mention of Baltimore's uncontradicted evidence on that point, set forth *supra*. No circuit since *Wyoming* was decided has even intimated that local legislative judgment could be discarded.

THE DISTRICT COURTS CONCLUSIONS OF FACT ARE CLEARLY ERRONEOUS.

The district court discounted Dr. Lind's testimony because it found that he based his testimony on one study

of black gold miners in South Africa. Of Dr. Lind's numerous publications in refereed scientific journals, he has authored no less than 45 scientific publications regarding the effects of heat on the human thermoregulatory mechanism. Joint Appendix, pp. 1146-53. These publications span nearly three decades of Dr. Lind's academic and professional life, and result in part from his twelve years of service to Britain's National Coal Board. Dr. Lind's area of specialty while he was the National Coal Board's research Fellow at Oxford University was in the physiology of the mines rescue worker — an underground firefighter performing rescues and fire suppression under the most arduous conditions imaginable. Transcript, Vol. 2, pp. 5, 14, Joint Appendix, p. 936,944. Dr. Lind testified primarily about the decrease in aerobic capacity and other physical attributes with age. His opinion on these issues had absolutely nothing to do with South African miners. To say that the district court was clearly erroneous in its evaluation of Dr. Lind's testimony is to say the very least.

The testimony of the the medical expert presented by Baltimore is not even mentioned in the district court's opinion. In addition to Dr. Antlitz, M.D., Col. Earl Ferguson, Ph.D., a cardiologist, internist, physiologist and flight surgeon for the U.S. Air Force, testified that because of the limitation on coronary testing, it was not practical or reasonable to conduct extensive coronary testing. In rejecting the testimony of Drs. Lind, Antlitz and Ferguson, the district court erred for exactly the same reasons set forth in the *Missouri Highway Patrol* case.

CONCLUSION

The district court's opinion represented a disastrous false step in the days before this Court's opinion in *Wyoming*. The Circuit Court's opinion is correct, and represents the emerging trend among the circuits. Review by this Court is not warranted.

Respectfully submitted,

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November, 1984

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APPENDIX

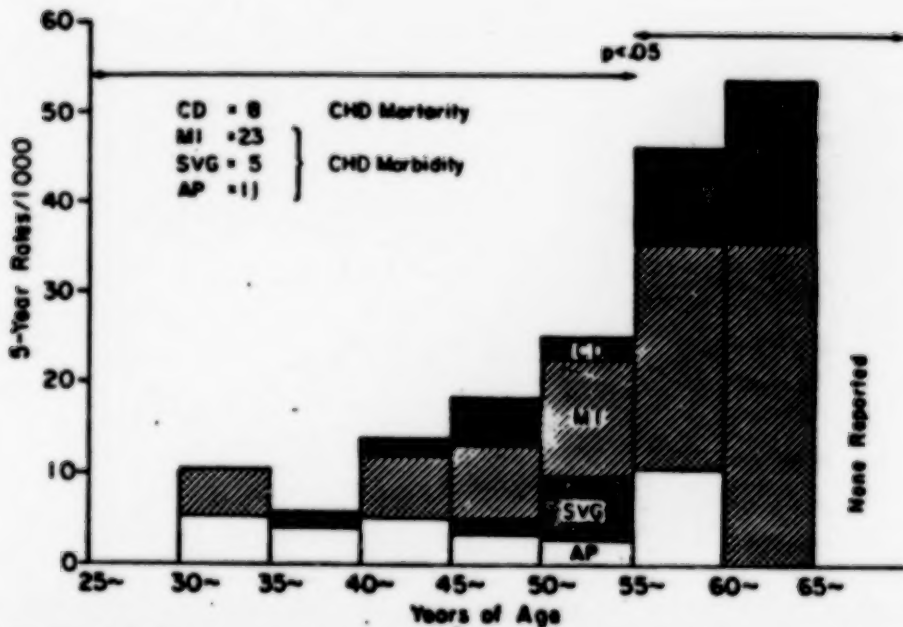


FIGURE 2. Five year rates of coronary heart disease events/1,000 men according to age at initial examination. There were no events in the small groups of persons 25 to 29 years of age and 65 to 69 years of age. AP = angina pectoris; CD = cardiac death; CHD = coronary heart disease; MI = myocardial infarction; p = probability; SVG = saphenous vein bypass grafting procedure.

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No. 84-518, No. 84-710

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL.,
Petitioners,
v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.,
Respondents.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,
v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR ROBERT W. JOHNSON, ET AL.

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QUESTION PRESENTED

Does the federal civil service retirement statute, 5 U.S.C. § 8335(b), which, in part, authorizes involuntary retirement of *federal* firefighters at age 55, establish as a *matter of law* that age 55 is a bona fide occupational qualification under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, for *non-federal* firefighters nationwide?

PARTIES TO THE PROCEEDINGS BELOW

Robert W. Johnson, August T. Stern, Jr., Thomas C. Doyle, Mitchell Paris, Robert L. Robey, James Lee Porter, and the Equal Employment Opportunity Commission were Appellees in the proceedings in United States Court of Appeals for the Fourth Circuit and are Petitioners here. Mayor and City Council of Baltimore was the Appellant in the proceedings in the United States Court of Appeals for the Fourth Circuit and is the Respondent here. Hyman A. Pressman, Chairman, and Donald D. Pomerleau, Calhoun Bond, Edward C. Heckrotte, Sr., Charles Daugherty, Paul C. Wolman, Jr., and Curt Heinfeldt, members of the Board of Trustees, Fire and Police Employees Retirement System of the City of Baltimore, were Defendants in the proceedings in the United States District Court for the District of Maryland, and did not appeal from that decision.

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ROBERT W. JOHNSON, ET AL.,
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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 731 F.2d 209, rehearing *en banc* denied, 731 F.2d 209 (4th Cir. 1984). The opinion of the United States District Court for the District of Maryland is reported at 515 F. Supp. 1287 (D. Md. 1981).

EDITOR'S NOTE

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JURISDICTION

The judgment of the court of appeals was entered on April 4, 1984. Rehearing *en banc* was denied on June 30, 1984. The petitions for certiorari were filed on September 27, 1984 (No. 84-518) and November 2, 1984 (No. 84-710), within the period for filing as extended by the Court. Both petitions were granted on January 14, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

The relevant provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, the Federal Civil Service Law, Government Organization and Employees, Chapter 83 — Retirement, 5 U.S.C. § 8335, and the Fire and Police Employee Retirement System of the City of Baltimore, Baltimore City Code, Article 22, Section 29, *et seq.*, are set forth in Appendix C of Petition for Certiorari in 84-518, at 43a-47a.

STATEMENT OF THE CASE

The Fire and Police Employee Retirement System of Baltimore City, Article 22, § 34(a)(2) and (4) of the Baltimore City Code (hereinafter referred to as "FPERS"), mandates the retirement of all firefighting personnel, below the rank of Lieutenant, at ages 55 and 60, depending on the date they entered the department service and the number of years that they have been in the service. (J.A. 3).¹ Lieutenants and other fire officers may work until age 65. (J.A. 3). In addition, firefighters hired prior to 1962 who chose to remain in the existing Employees Retirement System of the City of Baltimore,

¹ "J.A." refers to Joint Appendix. "R" refers to the Record in the United States District Court for the District of Maryland. "Johnson Pet." refers to the Petition for Certiorari in 84-518.

Article 22, § 3(f) Baltimore City Code (hereinafter referred to as "ERS"), may remain in the department service and continue working as firefighters until age 70. (J.A. 4). Petitioners, six Baltimore City firefighters, brought this action in the United States District Court for the District of Maryland, challenging this mandatory retirement provision under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* (hereinafter referred to as "ADEA") and the Fourteenth Amendment to the United States Constitution (Johnson Pet. 19a). Federal jurisdiction was conferred pursuant to 29 U.S.C. §§ 626(b), 217. Petitioner, Equal Employment Opportunity Commission (hereinafter referred to as "E.E.O.C.") intervened in support of the plaintiffs. (Johnson Pet. 19a).

The ADEA specifically prohibits mandatory retirement prior to age 70. 29 U.S.C. § 623(f)(2). Respondents, Mayor and City Council of Baltimore, et al. (hereinafter referred to as "the City"), asserted the bona fide occupational qualification exception (hereinafter referred to as "BFOQ"), 29 U.S.C. § 623(f)(1), established under the ADEA in support of its mandatory retirement age requirements. (Johnson Pet. 24a, 28a-39a). A non-jury trial was held before the Honorable Alexander Harvey, II, United States District Judge. Detailed and exhaustive expert testimony and other evidence was presented at the six-day trial on the BFOQ issue, to determine whether it was impossible or highly impractical to deal with the retirement of firefighters between ages 60 and 65 on an individual basis. (Johnson Pet. 28a-39a).

On June 9, 1981, the district court issued its decision rejecting the City's BFOQ defense and concluding that the City Ordinance violated the ADEA. (Johnson Pet. 18a-41a). Applying the two-prong test established in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976), and adopted by the Fourth Circuit in *Arritt v.*

Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977), the District Court found that the six plaintiff firefighters could safely and efficiently perform their jobs beyond age 60, or that the City, through testing, could identify those who were unfit. *Johnson v. Mayor and City Council of Baltimore*, 515 F. Supp. 1287, 1300-01 (D. Md. 1981). (Johnson Pet. 39a).

The City filed an appeal with the United States Court of Appeals for the Fourth Circuit.² A divided panel of the Fourth Circuit reversed the "thorough and impeccably reasoned opinion" of the court below. *Johnson v. Mayor and City Council of Baltimore*, 731 F.2d 209, 213 (4th Cir. 1984). (Johnson Pet. 7a). The panel majority did not disagree with the district court's finding that firefighters could safely and efficiently perform their jobs beyond age 60, or that those who are unfit could be identified through testing. Rather, relying on this Court's language in *E.E.O.C. v. Wyoming*, 460 U.S. 226, 240 (1983), where the Court held that the state's discretion in imposing a mandatory retirement age is merely being tested "against a reasonable federal standard," the majority stated that it "must initiate a search for a 'reasonable federal standard' by which to test whether age is a BFOQ for the City of Baltimore's firefighters." 731 F.2d at 212 (Johnson Pet. 5a). The majority found the standard to be embodied in a United States civil service statute, 5 U.S.C. § 8335(b), "mandating retirement as a general matter at fifty-five for federal police and firefighting employees." 731 F.2d at 212-13 (Johnson Pet. 5a). Under this statute, federal firefighters and law enforcement officers, nevertheless,

² The City also filed in this Court a Petition for Writ of Certiorari to review the judgment of the United States District Court for the District of Maryland before judgment in the Court of Appeals because of the Constitutional issues then pending before this Court in *EEOC v. Wyoming*, 514 F. Supp. 595 (D. Wyo. 1981), *rev'd* 460 U.S. 226 (1983). This Court denied certiorari, 455 U.S. 944 (1983).

may continue working beyond age 55 if they have less than twenty years of service or if their agency head determines that the public interest requires their continued employment. Contrary to the circuit court's direction that the BFOQ exception to the ADEA be adjudicated on a case-by-case basis, the majority concluded that "Congress' own reasonable federal standard" of age 55 as the mandatory retirement age for federal firefighters, establishes as a matter of law that age 55 is a BFOQ under the ADEA for all non-federal firefighters nationwide. 731 F.2d at 213 (Johnson Pet. 7a).

Chief Judge Winter dissented. He explained that neither the language nor the legislative history of 5 U.S.C. § 8335(b) supports the majority's conclusion that Congress, in establishing 55 as the mandatory retirement age for federal firefighters, intended to set age 55 as a BFOQ or determined that age 55 constituted a BFOQ (Johnson Pet. 14a). Furthermore, referring to footnote 17 of the *Wyoming* decision, Chief Judge Winter stated that "*Wyoming* . . . tells us that the broad requirements of ADEA are not to be constricted as a matter of law by what treatment Congress has afforded to comparable federal employees." (Johnson Pet. 15a). Thus, Chief Judge Winter concluded that the fact that Congress requires some federal firefighters to retire at 55, does not excuse Baltimore from proving facts necessary to establish a BFOQ under 29 U.S.C. § 623(f)(1) of the ADEA. (Johnson Pet. 15a).

Petitioners filed a Petition for Rehearing with Suggestion for Rehearing *En Banc*. On June 29, 1984, a divided (6-3) Fourth Circuit denied Petitioners' request for rehearing. (Johnson Pet. 17a).

SUMMARY OF ARGUMENT

The federal civil service retirement statute, 5 U.S.C. § 8335(b), which authorizes the involuntary retirement of

federal firefighters at age 55, does not establish, as a matter of law, that age 55 is a BFOQ under the ADEA for non-federal firefighters nationwide. The Fourth Circuit's conclusion finding such a *per se* BFOQ is totally misplaced.

1. An employer may justify the imposition of a specific mandatory retirement age under the BFOQ exception to the ADEA *only* if it can prove, through factual evidence, (1) that the BFOQ which it seeks to invoke is reasonably necessary to the essence of the business, and (2) that all or substantially all employees over the mandatory retirement age are unable to perform the duties of the job involved safely and efficiently, or that it is impossible or impractical to deal with persons over the age limit on an individual basis. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 234, 236 (5th Cir. 1976). This factual analysis is necessary in every case where an employer asserts age as a BFOQ, regardless of whether the occupation under scrutiny is hazardous or involves public safety.

2. In *E.E.O.C. v. Wyoming*, 460 U.S. 226, 240 (1983), the Court explained that under the ADEA the state's discretion in achieving its goals is merely being tested against a "reasonable federal standard." Contrary to the conclusion of the Fourth Circuit, there is no need to search other federal statutes to find some "reasonable federal standard" against which to scrutinize the age-based decision. The "reasonable federal standard" referred to by this Court is the BFOQ requirement established by Congress under the ADEA, and that Act requires a factual analysis of each case under the established two-prong BFOQ test.

This Court, in *Wyoming*, rejected the Fourth Circuit's conclusion that 5 U.S.C. § 8335(b), the federal civil service retirement statute setting age 55, in most instances, as the mandatory retirement age for federal firefighters and

law enforcement officers, establishes age 55 as a *per se* BFOQ for all non-federal firefighters and law enforcement officers. The occupation involved in *Wyoming* was state game wardens who are defined in the Wyoming statutes as "law enforcement officers." This Court, however, rejected Wyoming's argument that § 8335(b) established age 55 as a BFOQ for its employees, explaining that the requirements of the ADEA are not to be constricted as a matter of law "by the fact that the federal government happens to impose mandatory retirement on a small class of its own workers." 460 U.S. at 242-43 n.17.

3. Neither the text nor legislative history of 5 U.S.C. § 8335(b) supports the conclusion that age 55 is a BFOQ even for federal firefighters. Mandatory retirement schemes approved by Congress for federal employees are not subject to the strict requirements of the ADEA. These provisions only need be *rationally related* to a permissible government objective. *Vance v. Bradley*, 440 U.S. 93 (1979). In contrast, compulsory retirement schemes for state and local government employees must be rationally related *and* "reasonably necessary" to the operation of the particular business in a question to pass muster under the ADEA. *Orzel v. City of Wauwatosa*, 697 F.2d 743 (7th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 484 (1984).

Under 5 U.S.C. § 8335(b), federal firefighters are not necessarily required to retire at age 55. A firefighter may continue to work beyond that age if he has less than twenty years of service, if his agency head chooses to retain him, or if his agency head fails to give him the requisite 60 days' notice of separation. This statutory scheme "makes it impossible to say that there is a federally established BFOQ for [federal] firefighters at age 55." *Johnson v. Mayor and City Council of Baltimore*, 731 F.2d at 217 (Winter, C.J., dissenting) (Johnson Pet. 14a).

Congress could have, but chose not to amend the ADEA to specifically establish age 55 as a BFOQ for non-federal firefighters. In 1977, President Carter recommended to the 95th Congress that it carefully consider amending the ADEA to set a designated retirement age of less than 70 for occupations in which age is an important indicator of job performance. The 95th Congress amended the ADEA and did not establish any specific mandatory retirement age for non-federal firefighters. At the same time, however, Congress decided to retain the mandatory retirement ages it had established for federal firefighters.

4. Other federal courts which have considered the relevance of federal mandatory retirement statutes to the ADEA's BFOQ exception, have held that those statutes *do not establish*, as a matter of law, that age 55 is a BFOQ under the ADEA for comparable employees.

5. Congress has declared a strong federal interest in protecting the rights of older Americans and in prohibiting employment decisions based on unwarranted assumptions and age stereotypes. Thus, the ADEA requires that the state achieve its goals in a "more individualized and careful manner." *E.E.O.C. v. Wyoming*, 460 U.S. at 239. The only way in which this statutory purpose can be effected is through the application of the two-prong evidentiary BFOQ test. Reliance on unsubstantiated and unreviewed mandatory retirement ages established by Congress for federal employees is totally impermissible.

ARGUMENT

THE FEDERAL CIVIL SERVICE RETIREMENT STATUTE, 5 U.S.C. § 8335(b), WHICH AUTHORIZES THE INVOLUNTARY RETIREMENT OF FEDERAL FIREFIGHTERS AT AGE 55, DOES NOT ESTABLISH AS A MATTER OF LAW THAT AGE 55 IS A BFOQ UNDER THE ADEA FOR NON-FEDERAL FIREFIGHTERS NATIONWIDE.

A. THE ADEA REQUIRES THE SATISFACTION OF AN EVIDENTIARY TEST TO ESTABLISH THE EXISTENCE OF A BFOQ.

Congress has declared that the purpose of the ADEA is to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621. Although the Act prohibits employers from relying solely upon age as a measure of individual ability, the Act permits the use of age as an employment criteria where age is a BFOQ reasonably necessary to the normal operation of the particular business. 29 U.S.C. § 623(f)(1).

It continually has been recognized by the courts that the BFOQ exception to this remedial statute is an affirmative defense which is to be strictly construed and narrowly applied. *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982); *Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, *reh. denied*, 582 F.2d 966 (5th Cir. 1978). *Cf. Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974) (exceptions to Equal Pay Act). The employer asserting such an exception must prove "plainly and unmistakably" that its actions meet the terms and spirit of the provision. *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). As the Seventh Circuit explained in *Orzel v. City of Wauwatosa*, 697 F.2d 743 (7th Cir. 1983) *cert. denied* ___ U.S. ___, 104 S. Ct. 484 (1984):

Because the BFOQ exception frees an employer from the ADEA's general requirement of making individualized judgments regarding the ability of older workers, overuse of the exception involves the risk of reintroducing on a broad scale, the very age stereotyping the ADEA was designed to prevent.

697 F.2d at 748.

The clear mandate of Congress in enacting and subsequently in amending the ADEA to broaden its scope and prohibitions, requires that any age-based criteria be justified by facts, not by stereotypical assumptions about the ability of older workers to perform their jobs. Accordingly, in the House report accompanying the legislation that ultimately became the ADEA, Congress stated that:

The case-by-case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions.

H.R. Rep. No. 805, 90th Cong., 1st Sess. (Oct. 23, 1967) at 7. Similarly, the House report on the bill which became the 1978 amendments to the ADEA, addressed the issue of BFOQ in so-called hazardous occupations, explaining that:

In most cases, more important than the possible decline in capabilities experienced with age is the fact that this decline varies with individuals as to age and intensity, varies in importance to particular jobs and may be compensated for by other attributes which often increase by age, for example, experience and judgment.

H.R. Rep. No. 95-527 pt. 1, 95th Cong., 1st Sess. (July 25, 1977) at 12. Thus, a factual analysis is necessary to establish that a BFOQ exists for a particular job, whether the position under scrutiny is law enforcement, fire-fighting or sedentary.

As of present date, this Court has not established the test to be applied in determining the existence of an age-based BFOQ. The circuit courts, nevertheless, have developed a two-prong test which an employer must meet to establish the BFOQ defense. This test, while neither adopted nor rejected by the Court, has been recognized and cited by its members, *see, e.g., E.E.O.C. v. Wyoming*, 460 U.S. at 257-58 (Burger, C.J., dissenting).

In *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977), the Fourth Circuit explained that an employer satisfies the BFOQ test if it establishes:

(1) That the BFOQ which it invokes is reasonably necessary to the essence of its business . . . and

(2) That the employer has reasonable cause, i.e. a *factual basis* for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved, or that it would be impossible or impractical to deal with persons over the age limit on an individual basis.

567 F.2d at 1271 (emphasis added). Virtually every court of appeals to have considered the BFOQ has adopted this standard, which was first promulgated by the Fifth Circuit in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976); *E.E.O.C. v. County of Allegheny*, 705 F.2d 679 (3rd Cir. 1983); *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 844 (6th Cir. 1982); *Orzel v. City of Wauwatosa*, 697 F.2d 743, 753 (7th Cir. 1983); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), *cert. denied* 434 U.S. 966 (1977); *E.E.O.C. v. County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982); *Stewart v. Smith*, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982); *Cf. S. Rep. No. 95-493*, 95th Cong. 1st Sess. (1977);³ 29 C.F.R. § 1625.6 (1981).

³ The Senate Committee Report on the 1978 Amendments differs to some extent with the second part of the *Tamiami* test.

The courts in applying the established *Tamiami* test have uniformly required an individualized showing that an age restriction is necessary for a particular job, including a job that is hazardous and/or involves public safety. See *Smallwood v. United Air Lines, Inc.*, 661 F.2d at 308 (4th Cir. 1981) (flight engineer); *Orzel v. City of Wauwatosa*, 697 F.2d at 752 (assistant fire chief); *E.E.O.C. v. City of St. Paul*, 671 F.2d 1162, 1166 (8th Cir. 1982) (fire chief); *Tuohy v. Ford Motor Company*, 675 F.2d 842 (6th Cir. 1982) (non-commercial pilot); *Houghton v. McDonnell Douglas*, 553 F.2d at 564 (test pilot); *E.E.O.C. v. County of Santa Barbara*, 666 F.2d at 376-77 (corrections officer); *E.E.O.C. v. County of Los Angeles*, 706 F.2d 1039 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 984 (1984) (helicopter pilot); *Heiar v. Crawford County, Wisconsin*, ___ F.2d ___, 35 F.E.P. Cases 1458 (7th Cir. 1984) (deputy sheriff); *Aaron v. Davis*, 414 F. Supp. 453 (D. Ark. 1976) (firefighter).

Thus, to avoid liability under the ADEA, both the legislative history and courts instruct that the employer in *all* cases must demonstrate, by objective and credible

According to the Senate Committee, to establish age as a BFOQ an employer must prove that:

There may be a factual basis for believing substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, *and* it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employee's capacity or ability to continue to perform the job safely and efficiently. S. Rep. No. 95-493 (1977) (emphasis added). Thus, the burden of proof on an employer asserting age as a BFOQ is greater under the Senate Committee's test than under the *Tamiami* test. According to the Senate Committee, only upon a clear and convincing showing of the existence of *both* a factual basis for believing substantially all employees over a certain age are unable to perform the job *and* that it is impossible or impractical to test the individual employee's capabilities, may the court find age as a BFOQ.

evidence, that its age-based employment decision qualifies as a BFOQ necessary to the normal operation of the particular business. Each case must be separately adjudicated and resolved on the evidentiary record established at trial. See *Tuohy v. Ford Motor Co.*, 675 F.2d at 845-46 (6th Cir. 1982).

B. THE COURT BELOW MISREAD THIS COURT'S DECISION IN *E.E.O.C. v. WYOMING*.

1. *The Fourth Circuit Misconstrued the Meaning of the "Reasonable Federal Standard" Referred to in E.E.O.C. v. Wyoming.*

The Fourth Circuit's decision in the instant case runs entirely afoul to this two-prong BFOQ test. The court, in essence, carved out an exception to this test and explained that it is not necessary to apply the required factual analysis in determining whether a BFOQ exists with respect to firefighters. Believing that "(t)he question appears to be the same when raised for firefighters, in San Francisco or in Baltimore," the court explained, "(t)he situation may not fit the intended accommodation of differing factual circumstances lending themselves to a case-by-case resolution." 731 F.2d at 215 (Johnson Pet. 10a). Rather, the Fourth Circuit explained that in light of the decision in *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983), where this Court stated that "the State's discretion is merely being tested against a reasonable federal standard," 460 U.S. at 240, the courts now "must initiate a search for a 'reasonable federal standard' by which to test whether age is a bona fide occupational qualification for the City of Baltimore's firefighters." 731 F.2d at 212 (Johnson Pet. 5a). The Fourth Circuit then held that Congress made its search a simple one, by providing the standard. Relying on the federal retirement statute for law enforcement and firefighting employees of the federal government, 5 U.S.C. § 8335(b), which mandates re-

tirement for federal firefighters and various other federal employees at age 55, the Fourth Circuit concluded that Congress has established a "reasonable federal standard by which to measure firefighting in the City of Baltimore." 731 F.2d at 215 (Johnson Pet. 6a). Thus, the panel majority observed that Congress has legislatively answered the question that age 55 is a BFOQ for Baltimore City firefighters as well as all firefighters nationwide.

This conclusion of the Fourth Circuit is totally misplaced. It ignores the clear mandate of the ADEA that the BFOQ exception be adjudicated case-by-case. Furthermore, it reveals a failure to understand and to properly apply this Court's holding in *Wyoming*.

E.E.O.C. v. Wyoming concerned the constitutionality of the 1974 amendments to the ADEA extending the Act's coverage to state and local government employers. The State of Wyoming contended and the district court held that the ADEA impermissibly interfered with integral state governmental functions, and thus, under the doctrine enunciated in *National League of Cities v. Usery*, 426 U.S. 833 (1976), violated the Tenth Amendment to the United States Constitution.⁴ *E.E.O.C. v. Wyoming*, 514 F. Supp. 595, 600 (D. Wyo. 1981). On appeal, this Court reversed. The Court held that the extension of the ADEA to state and local governments does not violate the Tenth Amendment, since the ADEA's BFOQ exemption provides an adequate safeguard against any impermissible federal interference. All that the ADEA requires, the Court emphasized, is that the state, in achieving the goals of assuring the physical preparedness of its employees to perform their duties, do so "in a more individualized and careful manner than would otherwise be the case." 460 U.S. at 239 (emphasis added). Thus, the state may assess

⁴ On February 19, 1985 the Court, in *Garcia v. San Antonio Metropolitan Transit Authority*, ___ U.S. ___, 53 U.S.L.W. 4135 (1985), overruled *National League of Cities v. Usery*.

the fitness of its employees and dismiss those "whom it reasonably finds to be unfit." *Id.* In explaining the scope of the ADEA and the requirement placed on the states under the Act, the Court stated as follows:

Perhaps more important, Appellees remain free under the ADEA to continue to do precisely what they are doing now, *if they can demonstrate that age is a 'bona fide occupational qualification' for the job of game warden . . .* Thus, in contrast to the situation in *National League of Cities* [citations omitted], even the State's discretion in achieving its goals in a way it thinks best is not being overridden entirely, but is merely being tested against a reasonable federal standard.

460 U.S. at 240 (emphasis added). Accordingly, the Court remanded the case for a full evidentiary trial to test whether mandatory retirement at 55 is a BFOQ for Wyoming state game wardens.

The Fourth Circuit attempted to distinguish the fact pattern in this case from that in *E.E.O.C. v. Wyoming*. The court stated that unlike firefighting, where Congress by enacting 5 U.S.C. § 8335(b) has determined age 55 to be the federal standard at which such employees should retire, there exists no comparable federal statute "insofar as federal game wardens are concerned." 731 F.2d at 213, 215 n.19 (Johnson Pet. 7a, 10a n.19). The federal and Wyoming statutes reveal that this conclusion is factually incorrect.

By statute, game and fish wardens of the State of Wyoming are defined as "law enforcement officers." Wyo. Stat. § 9-3-190(a)(vii) and § 7-2-101 (1977). They are authorized to make arrests and enforce criminal violations of Wyoming game and fish laws. Wyo. Stat. § 23-6-101 (1977). This Court noted that these employees are law enforcement officers of the State of Wyoming. See *E.E.O.C. v. Wyoming*, 460 U.S. at 235, 241 n.15.

Similarly, federal game wardens are considered "law enforcement officers" as defined in 5 U.S.C. § 8331(20). Like federal firefighters, federal law enforcement officers, including federal game wardens (now classified as "Special Agent (Wildlife)"), must retire at age 55 pursuant to 5 U.S.C. § 8335(b). Thus, contrary to the Fourth Circuit's understanding, there is a federal statute governing the mandatory retirement of federal game wardens. Moreover, this is the identical statute and provision which mandates the retirement of firefighters, and which was relied upon by the Fourth Circuit in its conclusion that Congress had legislated a federal standard for the retirement of firefighters, but had not done so for federal game wardens.

The Fourth Circuit's opinion finding a *per se* BFOQ for mandatory retirement of Baltimore City firefighters at age 55, evidences its total failure to understand the Court's analysis in *Wyoming*. This Court never suggested that in each case where an employer raises the BFOQ defense, the court must search *other* federal statutes for some reasonable federal standard against which to scrutinize the age-based decision. Rather, by the statements quoted above and by remanding the *Wyoming* case for a trial on the BFOQ issue, the Court indicated that the ADEA has already established a reasonable federal standard — "the bona fide occupational qualification reasonably necessary to the normal operation of a particular business." 29 U.S.C. § 623(f)(1). Moreover, in accordance with this statutory language and the congressional mandate as expressed in the legislative history, the circuit courts have developed a uniform BFOQ test which is to be applied in the same manner in *all* cases, whether the employees be Wyoming game wardens, Los Angeles helicopter pilots or Baltimore City firefighters. Reliance on any other standard or guideline, including federal civil service retirement statutes for federal employees not covered by the ADEA, without analysis under

the requisite BFOQ test, is impermissible under the ADEA.

2. *This Court in Wyoming Rejected the Argument that Congress Has Established a Per Se BFOQ for Certain State and Local Government Employees.*

The Court in *Wyoming* was fully aware of the federal civil service laws, including 5 U.S.C. § 8335(b), that authorize retirement of certain federal employees before age 70. See, 460 U.S. at 243 n.17, 263 (Burger, C.J., dissenting). In its brief to the Court, the primary argument advanced by the State of Wyoming was that the Court should recognize the "federal model" of age 55 for the mandatory retirement of federal law enforcement officers established by Congress in 5 U.S.C. § 8335(b), and should apply that standard when scrutinizing mandatory retirement provisions applicable to comparable employees of state and local governments. Emphasizing that game wardens are law enforcement officers, Wyoming argued that "Congress has never expressed an intent that law enforcement officers be retained in employment until age 70." See *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983), Brief of Wyoming at 11-14. Rather, the mandatory retirement age of 55 found in 5 U.S.C. § 8335(b) is a "statement of Congressional policy," Wyoming explained, and should be given due deference. Moreover, Wyoming urged that "if it is reasonable for Congress to require law enforcement officers to retire at age 55, it is not 'arbitrary' for the states to do the same." *Id.* at 16.

The Court considered and rejected Wyoming's contention that 5 U.S.C. § 8335(b) established a federal standard governing the mandatory retirement of all non-federal law enforcement officers. The Court stated in footnote 17, the following:

We note, incidentally, that the strength of the federal interest underlying the [ADEA] is not

negated by the fact that the federal government happens to impose mandatory retirement on a small class of its own workers. . . . Once Congress has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in that declaration and must from that point on evaluate the sufficiency of the federal interest as a matter of law rather than of psychological analysis.

460 U.S. at 242-43 n.17.

In his dissenting opinion below, Chief Judge Winter noted the significance of footnote 17 and explained, "*Wyoming* . . . tells us that the broad requirements of the ADEA are not to be constricted as a matter of law by what treatment Congress has afforded it to comparable federal employees. Stated otherwise, the fact that Congress may require some federal firefighters to retire at age 55 does not excuse Baltimore from proving the facts necessary to satisfy 29 U.S.C. § 623(f)(1) [BFOQ]." 731 F.2d at 218 (Winter, C.J., dissenting) (Johnson Pet. 15a). Similarly, in *E.E.O.C. v. County of Los Angeles*, 706 F.2d 1039 (9th Cir. 1983), the Ninth Circuit, referring to footnote 17, noted that this Court considered and rejected the contention that mandatory retirement age for federal government employees is equally applicable to state and local government employees in similar occupations. 706 F.2d at 1041-42. See also *E.E.O.C. v. Commonwealth of Pennsylvania*, — F. Supp. —, 36 F.E.P. Cases 234, 238-39 (M.D. Pa. 1984). Significantly, the Fourth Circuit majority failed to even acknowledge, let alone attempt to reconcile footnote 17 of the *Wyoming* decision.

Accordingly, the *Wyoming* case was remanded for a full evidentiary trial on the issue of whether age 55 is a BFOQ for Wyoming's game wardens. In so doing, the Court indicated that the retirement statute for federal "law

enforcement officers," 5 U.S.C. § 8335(b), did not establish a *per se* BFOQ for their state and municipal counterparts. Otherwise, a remand would have been unnecessary. *Walston v. School Board of City of Suffolk*, 566 F.2d 1201, 1205 (4th Cir. 1977); *Cherokee Nation v. State of Oklahoma*, 461 F.2d 674, 676-78 (10th Cir.), *cert. denied* 409 U.S. 1039 (1972).

C. NEITHER THE TEXT NOR LEGISLATIVE HISTORY OF 5 U.S.C. § 8335(b) AND OF THE ADEA SUPPORTS THE CONCLUSION THAT AGE 55 IS A BFOQ EVEN FOR FEDERAL FIREFIGHTERS.

As explained above, a specific mandatory retirement age is deemed to be a BFOQ under the ADEA only where it can be demonstrated that at a certain age firefighters as a group can no longer be relied upon to safely and efficiently perform their jobs. The Fourth Circuit held that age 55 is a BFOQ for all firefighters *nationwide*, since Congress has determined that federal firefighters must retire at age 55. The court stated as follows:

Where Congress itself has deemed age to be a *bona fide* occupational qualification for federal firefighters we perceive no justification for ignoring the Congressional mandate in ascertaining 'a reasonable federal standard' by which to measure firefighting in the City of Baltimore. Both federal and city firefighters are engaged in extremely stressful and hazardous activities designed to promote public safety. Absent a determination that age, specifically no more than fifty-five as a general rule, is a *bona fide* occupational qualification for firefighters, we would be compelled to conclude that Congress, in authorizing the automatic retirement of federal police and firefighting personnel, adopted an occupational qualification that is not, or might not be, *bona fide*. A court should not lightly make such a determination as to Congressional purpose.

731 F.2d at 212-13 (Johnson Pet. 6a). This conclusion, however, reveals the failure of the Fourth Circuit to understand both that mandatory retirement ages for federal firefighters and law enforcement officers are not required to satisfy the ADEA's BFOQ requirements, and the statutory scheme of the federal retirement provisions. Furthermore, the legislative history of 5 U.S.C. § 8335(b) does not support the lower court's conclusion that Congress reached any determination whatsoever that age 55 is BFOQ for federal firefighters.

1. *Statutory Scheme of 5 U.S.C. § 8335(b)*

Initially, it must be remembered that mandatory retirement schemes approved by Congress for federal employees are not subject to the strict requirements of the ADEA. The federal employee compulsory retirement schemes need only be rationally related to a permissible government objective, and must not be so unreasonable as to constitute an arbitrary and capricious exercise of legislative power. *Vance v. Bradley*, 440 U.S. 93 (1979); *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982); *Starr v. Federal Aviation Administration*, 589 F.2d 307 (7th Cir. 1978). In contrast, as the Seventh Circuit explained in *Orzel v. City of Wauwatosa*, 697 F.2d 743 (7th Cir. 1983), to pass muster under the ADEA, compulsory retirement schemes for state and local government employees must not only be rationally related, but must also be "reasonably necessary" to the operation of the particular business in question. 697 F.2d at 749. Thus, "an employer seeking to justify its mandatory retirement age as a valid BFOQ must satisfy a much more stringent evidentiary test than the mere rationality requirement imposed on federal retirement schemes." 697 F.2d at 749-50. Accordingly, in *Orzel*, the court properly concluded that the fact that Congress has determined that age 55 is an appropriate retirement age for one group of firefighters who are not protected by the ADEA's requirements, does not auto-

matically establish that same retirement age is a valid BFOQ for a wholly different group of employees who are covered under the ADEA. 697 F.2d at 750. *See also E.E.O.C. v. County of Los Angeles*, 706 F.2d at 1041. (Congress, in establishing certain age restrictions applicable to federal employees, created an exception to the ADEA, and no BFOQ is necessary to justify the maximum age entry requirements for federal law enforcement officers). *Mahoney v. Trabucco*, 738 F.2d 35, 40-41 (1st Cir. 1984), *cert. denied*, ___ U.S. ___, 53 U.S.L.W. 3403 (1984) (Congress need not adhere to ADEA standards in setting mandatory retirement ages for federal personnel); *E.E.O.C. v. Commonwealth of Pennsylvania*, ___ F. Supp. ___, 36 F.E.P. Cases at 238-39 (M.D. Pa. 1984).

The text of the federal retirement statute does not support the Fourth Circuit's conclusion that Congress reached any finding that age 55 constitutes a BFOQ for *federal* firefighters. Under § 8335(b), a federal firefighter is to retire at age 55 only if he has completed 20 years of service. If he has not, he may remain in the federal fire service beyond age 55, until he has completed 20 years. The federal statute provides that the agency head may retain a federal firefighter until he becomes 60 years of age, and further, that the President may exempt an employee from automatic separation under § 8335(b) when he determines the public interest so requires. 5 U.S.C. § 8335(d). Finally, a federal firefighter may be required to work beyond age 60 if his agency head fails to give him the 60 days' notice of separation, or if he has not completed 18 years of service as required by § 8336(c)(2).

Thus, as Chief Judge Winter observed in his dissenting opinion below, this statutory scheme "makes it impossible . . . to say that there is a federally established BFOQ for firefighters at age 55." 731 F.2d at 217 (Johnson Pet. 14a). Rather, the opposite is true — the statute is a Congressional acknowledgement that firefighters can safely

and efficiently perform beyond the prescribed mandatory retirement age of 55, and can be dealt with on an individual basis.

2. *Legislative History of 5 U.S.C. § 8335(b)*

The legislative history of 5 U.S.C. § 8335(b) does not support a conclusion that Congress, in establishing the mandatory retirement age for federal firefighters and law enforcement officers, reached any finding that age 55 constituted a BFOQ for these occupations. The Senate Report accompanying the bill which eventually became 5 U.S.C. § 8335(b), revealed a congressional intent to liberalize retirement provisions so as to make it feasible for federal firefighters and law enforcement officers to retire at age 50. The report acknowledged that this intent was based on the vigorous demands of these positions which are "far more taxing than most in the Federal Service." S. Rep. No. 93-948, 93rd Cong. 2nd Sess. (1974). "Older employees in these occupations," the report concluded, "should be *encouraged* to retire." *Id.* (emphasis added).

Chief Judge Winter noted in his dissenting opinion below that "it must be remembered, however, that this language was used in relation to *voluntary* retirement, not *involuntary* retirement, as Baltimore City requires." 731 F.2d at 217. (Johnson Pet. 14a) (emphasis in original). With respect to involuntary retirement, the report states that "the bill provides for mandatory retirement of an *eligible* employee at age 55 or after 20 years, whichever occurs *later*." S. Rep. No. 93-948 (emphasis added), Chief Judge Winter properly concluded, therefore, that "the legislative history, with its emphasis on 'eligible' employee and resort to an alternative formula under which an employee may not be required to retire until he has completed 20 years of service, belies the existence of congressional intent, perceived by the majority, to fix age

fifty-five as a BFOQ." 731 F.2d at 217-18 (Johnson Pet. 14a).

The preservation of these mandatory retirement provisions for certain federal employees, moreover, was the product of an agreement to provide the congressional committee having jurisdiction over the retirement programs with the opportunity to review these provisions, particularly since most were part of liberalized retirement programs. *Vance v. Bradley*, 440 U.S. at 97 n.12 (1979). During the consideration of the 1978 amendments to the ADEA in the House, Representative Spellman offered an amendment on behalf of the House Post Office and Civil Service Committee:

To continue in effect those mandatory retirement provisions which are applicable to specific civil service occupations such as air traffic controller, law enforcement officer and firefighter.

* * * * *

I hasten to point out that this amendment does not indicate opposition *per se* [sic] to elimination of mandatory retirement for air traffic controllers, firefighters, and other specific occupations.

However, since most of these mandatory retirement provisions are part of the liberalized retirement program, our committee believes that such provisions should not be repealed until the individual retirement programs have been re-examined.

123 Cong. Rec. 30556 (1977).

Representative Hawkins, in agreeing to this amendment offered by Representative Spellman, stated:

By this action we are not reaffirming the mandatory retirement ages in the statutes applicable to these positions. The sole purpose of this agreement is to afford the committees the opportunity to review these statutes.

Id.

It is clear that Congress did not intend § 8335(b) to operate as a legislative BFOQ for the federal personnel governed by that section, much less their state or municipal counterparts. Rather, the very existence of § 8335(b) is being tolerated by Congress, pending committee review, because its mandatory retirement provisions are integrally related to "liberalized retirement programs" for the federal personnel affected. In fact, a number of federal agencies reviewing these mandatory retirement schemes have raised serious questions concerning their continued viability. See discussion *infra* at 35.

As the legislative history demonstrates, there may be any number of reasons why Congress chose to retain the mandatory retirement age for certain federal employees. It cannot be assumed, therefore, that Congress applied a BFOQ analysis, or that its reasons would withstand BFOQ scrutiny, or that it intended, in some way, to limit its federal interest in prohibiting age discrimination with respect to certain non-federal employees. This Court should not read "into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in . . . [its] declaration of the strong federal interest underlying the ADEA." 460 U.S. at 242-43 n.17. The only way that the BFOQ requirement can be satisfied, therefore, is through a factual scrutiny of the particular job in question, under the two-prong *Tamiami* test.

3. *Congress Could Have, But Chose Not to Amend the ADEA to Set Age 55 as a BFOQ for Non-Federal Firefighters Covered by the Act.*

In 1974, the 93rd Congress extended the ADEA to state and local governments, including firefighting and law enforcement employees of those employers. That same

93rd Congress, a few months later, enacted 5 U.S.C. § 8335(b), establishing the mandatory retirement age of 55 or 20 years of service for *federal* firefighters. Clearly, Congress could have modified the ADEA at that time to provide a similar exemption for non-federal personnel, but chose not to do so.

In 1977 and 1978, Congress again considered proposed amendments to the ADEA. One of the changes suggested by President Jimmy Carter was to establish a mandatory retirement age of less than 70 for certain occupations. In a letter dated September 23, 1977 to Senator Harrison A. Williams, Chairman of the Senate Labor Subcommittee, which was considering amendments to the ADEA, President Carter stated:

There are two matters which I would urge the committee to consider carefully.

First, I believe it is important that the legislation clearly permit the establishment of a designated retirement age less than age 70 where age has been shown to be an important indicator of job performance. Certain types of law enforcement activities and air traffic control are frequently mentioned as examples.

. . . .

U.S. Department of Labor, Employment Standards Administration, *Age Discrimination in Employment Act of 1967: A Report Covering Activities Under the Act During 1977 Submitted to Congress in 1978 in Accordance with Section 13 of the Act*, Appendix B, A-7 (June 14, 1978). Although Senator Williams advised Congress of this request of President Carter, see 123 Cong. Rec. 34296 (1977) (Remarks of Senator Harrison Williams), it was never adopted by the Congress.

The ADEA was amended in 1978 and for the first time Congress made it unlawful to involuntarily retire employ-

ees regardless of whether or not their compulsory retirement is pursuant to a bona fide employee benefit plan. Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978); *Compare* 29 U.S.C. § 623(f)(2) (1967) with 29 U.S.C. § 623(f) (1978). At the same time, Congress retained the mandatory retirement provisions for certain federal employees, including 5 U.S.C. § 8335(b) covering federal firefighters. *See* discussion of legislative history regarding this retention of federal mandatory retirement provisions at 23, *supra*. Furthermore, and most significant, Congress once again did not write any exemption into the ADEA for firefighters employed by state and local governments, nor did it set age 55 as a general mandatory retirement age for these employees, as it had done and had reaffirmed for their federal counterparts. This is despite the fact that a Presidential recommendation that it do so was before the Congress. Rather, Congress chose to leave in the law, unchanged, the existing BFOQ exemption it had established in 1967 under the original ADEA. The BFOQ standard was now the *only* means by which mandatory retirement provisions could be declared lawful under the ADEA. *See Trans World Airlines, Inc. v. Thurston*, ___ U.S. ___, 105 S. Ct. 613, 623 (1985) for discussion of legislative history regarding applicability of existing BFOQ provision to the 1978 mandatory retirement amendment.

Congress' failure to eliminate mandatory retirement provisions for federal firefighters provides no basis for assuming that these provisions establish age 55 as a BFOQ for state and local firefighters, or for discounting the significance of the federal interest in prohibiting arbitrary age discrimination. Furthermore, there is no warrant for reading into the ADEA, exemptions which were before Congress, and which could have been provided, but which Congress chose not to so provide. *Cf. Lehman v. Nakshian*, 453 U.S. 156 (1981) (where

Congress expressly provided for jury trials in section of ADEA applicable to non-federal employees, jury trial not available under ADEA to federal employees).

D. THE FOURTH CIRCUIT'S FEDERAL STANDARD/PER SE BFOQ THEORY HAS BEEN UNIFORMLY REJECTED BY OTHER FEDERAL COURTS.

The only other courts to consider the relevance of federal mandatory retirement statutes to the ADEA's BFOQ exception, have held that the the former *does not establish*, as a matter of law, a BFOQ under the ADEA for comparable employees. *Orzel v. City of Wauwatosa*, 697 F.2d 743 (7th Cir. 1983); *E.E.O.C. v. County of Los Angeles*, 706 F.2d 1039 (9th Cir. 1983); *Heiar v. Crawford County, Wisconsin*, ___ F.2d ___, 35 F.E.P. Cases 1458 (7th Cir. 1984); *E.E.O.C. v. Commonwealth of Pennsylvania*, ___ F. Supp. ___, 36 F.E.P. Cases 234 (M.D. Pa. 1984), *Cf. E.E.O.C. v. Missouri State Highway Patrol*, ___ F.2d ___, 36 F.E.P. Cases 401 (8th Cir. 1984).

In *Orzel*, an assistant fire chief challenged the City's action in terminating his employment upon reaching age 55, the mandatory retirement age for all "protective service" employees. The city contended that its policy was proper in that Congress could not possibly have intended to prohibit state and municipal employers from adopting age 55 as a mandatory retirement age for local firefighters while, at the same time, authorize compulsory retirement for federal firefighters at age 55. The Seventh Circuit rejected this argument. The court explained that the compulsory retirement schemes scrutinized under the ADEA must be "reasonably necessary" to the operation of the particular business in question. Thus, the court concluded, "an employer seeking to justify its maximum retirement age as a valid BFOQ, must satisfy a much

more stringent evidentiary test than the mere rationality requirement imposed on federal retirement schemes." 697 F.2d at 749-50.

The Seventh Circuit once again addressed this issue in *Heiar v. Crawford County, Wisconsin*, and reaffirmed its conclusion in *Orzel*. The court explained that the federal standard/*per se* BFOQ theory was invalid on two additional grounds. First, the court noted that the statutory scheme of 5 U.S.C. § 8335(b) cannot accurately be described as *requiring* retirement at age 55, since the federal employees, for any number of reasons, may continue working after reaching age 55. 35 F.E.P. Cases at 1464. Second, "to make the fact that the federal government has imposed a mandatory retirement age on its own employees *conclusive* on the question whether such a retirement age is reasonable for state or local officers having similar duties," the court emphasized, "would apply section 8335(b) far beyond its scope — would make a statute applicable only to federal officers applicable in effect to state and local officers as well." *Id.* (emphasis added).

Similarly, the County of Los Angeles attempted to justify its maximum hiring age for helicopter pilots in its sheriff and fire departments by contending that age was a BFOQ and by arguing that any age-related restrictions tolerated in federal occupations should apply equally to similar state and local occupations. *E.E.O.C. v. County of Los Angeles*, 706 F.2d at 1041. The Ninth Circuit dismissed this contention on three grounds. First, concurring with the theory expressed by the Seventh Circuit in *Orzel*, the court explained that Congress, in establishing certain age restrictions applicable to federal employees, created an exception to the ADEA and no BFOQ was necessary to justify the maximum age entry requirements for federal law enforcement officers. 706 F.2d at 1041, citing *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982).

Second, quoting both footnote 17 of this Court's decision in *Wyoming*, and Chief Justice Burger's dissent, the Ninth Circuit recognized that in *E.E.O.C. v. Wyoming*, this Court considered and rejected the county's argument that age-related restrictions tolerated in federal occupations should apply equally to similar state and local occupations. Third, the court emphasized that "a factual foundation is necessary to establish that age is a BFOQ. . . . courts cannot assume, in the absence of any evidence as to its effects on performance, that age, *per se*, constitutes a BFOQ." 706 F.2d at 1042, quoting *E.E.O.C. v. County of Santa Barbara*, 666 F.2d 373, 376, 377 (9th Cir. 1982). See also *E.E.O.C. v. Commonwealth of Pennsylvania*, 36 F.E.P. Cases at 238-39.

In *Tuohy v. Ford Motor Company*, 675 F.2d 842 (6th Cir. 1982) the Sixth Circuit expressly rejected the district court's conclusion that the Federal Aviation Administration's (FAA) "Age 60 Rule," requiring the retirement of commercial pilots at age 60, was a *per se* BFOQ for non-commercial pilots, preempting further evidentiary inquiry into the reasonable necessity of Ford's analogous mandatory retirement scheme. The Sixth Circuit explained as follows:

"The presence of an overriding safety factor might well leave a court to conclude as a matter of policy that the level of proof required to establish the reasonable necessity of a BFOQ is relatively low. However, this is quite different from dispensing with the requirement of necessity and holding that a BFOQ has been established as a matter of law because adoption [by another body] of a rule based on age was reasonable." 675 F.2d at 845 (citations omitted).

Accordingly, the court remanded the case for trial on the issue of whether safety considerations render an Age 60 rule for the employer's pilots reasonably necessary. The

court explained that to establish the reasonable necessity, the employer must present a factual basis for its determination that medical science cannot predict, on an individual basis, the likelihood that a pilot who has reached age 60 will become incapacitated during flight, and that there is a factual basis for believing that all pilots over age 60 are unable to perform their duties safely. 675 F.2d at 346.⁵

⁵ *Gathercole v. Global Associates*, 727 F.2d 1485 (9th Cir. 1984) does not establish that the FAA Age 60 rule is a *per se* BFOQ for non-commercial pilots. In that instance, the court held that an employer properly relied on the Age 60 rule in involuntarily retiring its pilots at age 60. Although the pilots were not covered by the rule, the contract between their employer and the U.S. Army, for whom the employer provided the pilots' services, required that the employer adhere to the Age 60 rule. The court explained that neither the employer nor the Army was in any position to question the applicability and soundness of or evidentiary support for the FAA regulation. Moreover, the court emphasized and seemed to be persuaded by the fact that if the employer were not permitted to mandatorily retire employees at age 60, it would be placed in an "unjust dilemma — either to break its contractual promise to the government . . . or to fail in its obligation to obey a statutory command of the government." 727 at 1488. "To cap the matter," the court explained, the Department of Labor regulations interpreting the BFOQ exception under the ADEA, 29 C.F.R. § 860.102, state that federal statutory and regulatory requirements which provide for compulsory retirement are examples of a "possible" BFOQ. 727 F.2d at 1488.

First, the soundness of the court's decision is highly questionable, for its reliance on the Department of Labor regulations is completely misplaced. On September 27, 1981, the EEOC promulgated new regulations which superceded and effectively rescinded the Department of Labor regulations, including 29 C.F.R. § 860.102. *See* 46 F.R. 47724 (1981). The Labor Department regulations may no longer be relied upon. *Id.* Moreover, the EEOC regulations deleted the "examples" of possible BFOQ's (including the federal statutory and regulatory requirement example) from its explanation of BFOQ under the ADEA. The EEOC explained that the examples "were deleted to avoid the appearance that those examples had received the imprimatur of the Commission. Most notable in this regard is the controversial age-60 rule of the FAA." *Id.* at 47725.

The Eighth Circuit's opinion in *E.E.O.C. v. Missouri State Highway Patrol*, ___ F.2d. ___, 36 F.E.P. Cases 401 (8th Cir. 1984), does not support the Fourth Circuit's *per se* BFOQ theory. That case involved, among other things, a challenge to the state statute requiring uniformed highway patrol officers to retire at age 60. The court extensively analyzed the evidence presented at trial concerning the nature and duties of the positions in question, as well as the substantial expert testimony relating to the effects of age on one's ability to perform the job and whether tests were available which could measure, with reasonable accuracy, an individual's ability and his risks. 36 F.E.P. Cases at 403-08. The court concluded that the Missouri State Patrol had established that there is a factual basis for believing that substantially all patrol members over age 60 lack sufficient aerobic capacity to perform their duties safely and efficiently, and that testing could not adequately distinguish among individuals over 60. Accordingly, the mandatory retirement age was found to be a BFOQ. 36 F.E.P. Cases at 407-08.

In passing, the court noted that it found "persuasive" that Congress has authorized a general mandatory retirement age of 55 for federal law enforcement officers.

Second, it is highly doubtful that the court intended this decision to be a revision of its holding in *EEOC v. Los Angeles*. That case, decided less than one year prior, was never mentioned nor referred to by the court in *Gathercole*.

Moreover, this decision is distinguishable from the situation involved herein. It involves an employer's reliance on an administrative rule which was specifically promulgated to cover *private* commercial pilots who are covered by the ADEA. Thus, to pass muster under the Act, the FAA Age 60 rule must be reasonably necessary to the operation of the particular business; the court assumed that the FAA had sufficient evidence to meet this standard. In contrast, the federal retirement statute, 5 U.S.C. § 8335(b), need only be rationally related to a legitimate government purpose, and its mandatory retirement age does not have to constitute a BFOQ.

Like Congress, the court asserted, the State of Missouri has a valid concern in maintaining a youthful and vigorous law enforcement staff. The court, however, never stated that the federal mandatory retirement statutes establish conclusively and as a matter of law that age 55 is a BFOQ for Missouri highway patrol officers, as the Fourth Circuit had found they did with respect to Baltimore City firefighters. If the Eighth Circuit had reached such a conclusion, there would have been no need for the court to scrutinize the evidentiary record established at trial and to apply the two-prong *Tamiami* test in order to reach its holding that age 60 was a BFOQ for the state patrol officers.

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E. APPLYING THE TWO-PRONG EVIDENTIARY BFOQ TEST IS CONSISTENT WITH THE OVERRIDING FEDERAL INTEREST IN ABOLISHING UNWARRANTED AGE STEREOTYPING AND DISCRIMINATION, AND WITH THE CONGRESSIONAL MANDATE THAT THE ADEA BE ADJUDICATED ON A CASE-BY-CASE BASIS.

During the 1977-78 congressional debate on the proposed amendments to eliminate from the ADEA the mandatory retirement exceptions, Senator Jacob K. Javits, the ranking minority member of the Senate Labor Subcommittee, explained that the committee believed that the established BFOQ exemption sufficiently protected employers who sought to enforce legitimate mandatory retirement rules. Acknowledging the two-prong BFOQ test, and reading from the Senate committee report, Senator Javits stated as follows:

The committee intends to make clear that under this legislation an employer would not be required to retain anyone who is not qualified to perform a particular job. For example, in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age

would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently.

123 Cong. Rec. 17299 (1977) (Remarks of Senator Jacob K. Javits). Further, noting that while an employer may seek guidance from the agency administering the Act (then the Department of Labor) as to whether its mandatory retirement scheme is a valid BFOQ, Senator Javits stated that the courts are the last resort in any disagreement over the applicability of the BFOQ exception. *Id.* The Senator's remarks, therefore, indicate that Congress had not established any definite age as a BFOQ for any position covered by the ADEA. Rather, resort to the BFOQ test and a separate adjudication is required in *all* cases, regardless of the specific occupation for which the BFOQ is sought. See pp. 9-13, *supra*. Furthermore, the court should examine only the particular facts of the case before it. *E.E.O.C. v. County of Santa Barbara*, 666 F.2d 373; *Stewart v. Smith*, 673 F.2d at 491 n.26.

Such a factual approach in evaluating a purported BFOQ is consistent with the statutory scheme and must be followed. Congress has declared a strong federal interest in protecting the rights of older Americans and in abolishing subjective and unwarranted assumptions that older persons are unable to adequately perform. *E.E.O.C. v. County of Santa Barbara*, 666 F.2d at 37² n.8; *Bonham v. Dresser Industries Inc.*, 569 F.2d 187, 193 (3rd Cir. 1977), *cert. denied*, 439 U.S. 821 (1979). The key to the ADEA statutory scheme is that the *individual's* abilities rather than age, stereotypes, or generalizations, are to be considered in making decisions effecting his employment. Thus, a factual foundation is necessary to establish a BFOQ. To simply conclude, as the lower court did, that

since Congress has selected age 55 to be the retirement age for federal firefighters, age 55 is therefore a BFOQ for non-federal firefighters, without any evidentiary scrutiny to determine whether age 55 is in fact a BFOQ, runs entirely afoul to the entire purpose of the Act. The result of such an approach would be to "reintroduc[e] on a broad scale, the very age stereotyping the ADEA was designed to prevent." *Orzel v. City of Wauwatosa*, 697 F.2d at 748.

In his dissenting opinion in *Wyoming*, Chief Justice Burger recognized that there are no statutory guidelines to explain what constitutes a BFOQ, and as a result, the courts have established the two-prong *Tamiami* test. 460 U.S. at 257-258 (Burger, C.J., dissenting). The Chief Justice, however, expressed concern with the BFOQ defense because "(g)iven the state of modern medicine, it is virtually impossible to prove that *all* persons within a class are unable to perform a particular job or that it is impossible to test employees on an individual basis." 460 U.S. at 258 (emphasis added).

There is no need for this concern, however, for if medical science has developed to such an extent that employees can be tested *individually* to ascertain their ability to work beyond the prescribed mandatory retirement age and to identify those who pose risks, then the proper balance between the public employer's interests and the employees' interests has been struck under the ADEA. The state's interests are not impaired, since "it may still, at the very least, assess the fitness of its [employees] and dismiss those [employees] who it finds to be unfit." 460 U.S. at 239. In fact, if modern medicine is so sophisticated, then the state would be able to make its employment decisions based on empirical facts, rather than on generalized assumptions that all individuals over a certain age are unable to perform and must be retired. This is precisely what Congress intended and what the ADEA requires — that the state "achieve its goals in a more individualized

and careful manner than would otherwise be the case, but it does not require the state to abandon its goals or to abandon the policy decisions underlying them." *Id.*

Significantly, many of the federal government agencies reviewing the mandatory retirement provisions applicable to federal firefighters and law enforcement officers have seriously questioned the wisdom of retaining such provisions. See J.A. 13-15. A Government Account Office (GAO) report prepared by the Comptroller General and entitled *Special Retirement Policy for Federal Law Enforcement and Firefighter Personnel Needs Reevaluation*, (1977), criticized the age restrictions in the federal government, and suggested alternatives, such as individualized testing. (J.A. 13-14). The report, citing statistics, indicated that many firefighters work beyond the mandatory retirement age without significant effect on their employment. (J.A. 14). The GAO concluded that if an employee becomes physically unable to continue performing his or her job, the employee should be retired according to accepted disability practices that operate on a case-by-case determination. (J.A. 14). The Office of Personnel Management (OPM), in its report, *Staff Paper on the Early Retirement Policy for Federal Law Enforcement and Firefighter Personnel*, also questioned the need for a preferential early retirement plan for federal law enforcement and firefighter personnel. The OPM emphasized that the early retirement plan resembles disability retirement, but the individual employee is not required to show any disability. (J.A. 14-15). The report "cautiously" recommended retaining the program but with more specific criteria based on job-related physical requirements. (J.A. 15). Finally, and most noteworthy, both the United States Fire Administration and the Law Enforcement Assistance Administration have found individualized testing to be both possible and desirable. (J.A. 15).

The EEOC reviewed these and other studies to determine whether it should issue regulations allowing state and local governments to use maximum entry-level age restrictions and mandatory retirement for police and firefighters. (J.A. 5-23). An extensive internal EEOC memorandum, dated August 14, 1980, found that while higher than average physical fitness standards are necessary for police and firefighters, tests are available to adequately measure the physical requirements of the job. (J.A. 18). The memorandum further explained:

In sum, statistics appear to be available that can rebut assertions that there are stringent physical demands for police and firefighters that mandate age restrictions. The current physical fitness levels, often tested, and the lack of uniformity among state and local governments provide data that substantiate the claim that many older people are physically capable of performing the duties of the various law enforcement and firefighter occupations.

(J.A. 19-20). For the EEOC to offer an exemption to state and local governments, the memorandum concluded, "would be to perpetuate arbitrary limits where individualized testing appears to be a feasible alternative." (J.A. 20).

This lack of uniformity of mandatory retirement ages for firefighters employed by state and local governments, noted in the EEOC memorandum, establishes that age 55 is not a BFOQ for this job. A nationwide survey of state and local fire departments, conducted by Edward C. Heckrotte, Sr., President of Baltimore Firefighters Local 734, IAFF (AFL-CIO) during the periods from 1972-1975 and 1978-1981, and a trustee of Board of Trustees of the FPERS of the City of Baltimore since 1968, revealed the following — 33 departments had no mandatory retirement age whatsoever for firefighters; 29 departments required retirement at age 70; 2 departments mandated retirement

at age 68; 61 departments involuntarily retired their firefighters at age 65; 14 departments mandated retirement between ages 62-64; 27 departments retired employees at age 60. Most significantly, only one department required firefighters to retire at age 55 — that department was Baltimore City, under its FPERS. (J.A. 24-37).

Finally, the statutory scheme of Baltimore City's FPERS reveals that the mandatory retirement ages set forth therein also are not based on any BFOQ determination. While the ordinance requires retirement at age 55 as a general matter, it permits firefighters to continue working (1) until age 60 if they entered the service prior to July 1, 1962, Article 22, § 34(a)(4) Baltimore City Code (J.A. 3), and (2) until age 65 if they have less than 25 years of service. Article 22, § 34(a)(3), Baltimore City Code (J.A. 3). Furthermore, firefighting employees who hold the rank of lieutenant or above are not required to retire until age 65. Article 22, § 34(a)(2), Baltimore City Code (J.A. 3). This is despite the fact that the evidence presented at trial in the district court clearly established that many of these fire officers are actively engaged in fighting fires on the fireground to the same extent as the firefighters (R. 67, 139, 167, 181, 190-91). Lastly, firefighters who, in 1962, chose to remain in the ERS, rather than join the FPERS, need not retire until age 70. Article 22, § 3(f), Baltimore City Code (J.A. 4). Thus, given these various mandatory retirement ages for employees performing virtually identical jobs and requiring the same fitness and ability, it is impossible to say that age 55 is a BFOQ for Baltimore City's firefighters.

Congress, in amending the ADEA to cover firefighters employed by state and local governments, while, at the same time requiring federal firefighters to retire at age 55 under certain circumstances, chose to subject the non-federal government employers to a different and more

stringent standard. To legally retire firefighters at a specified age, the state or local employer, like any other employer covered by the ADEA, must establish that its mandatory retirement scheme is not just rationally related, but is reasonably *necessary*. This must be accomplished by presenting factual evidence, under the two-prong *Tamiami* test, showing the impact of age on one's ability to perform the tasks required of the position. The Fourth Circuit's reliance on 5 U.S.C. § 8335(b), as establishing age 55 as a BFOQ for Baltimore City firefighters, simply because that statute requires federal firefighters to retire at age 55, is completely misplaced. The court's conclusion was not based on any actual showing that age 55 has been found to be a BFOQ for firefighting, or that Congress *intended* the requirements of § 8335(b) to be applicable to employees covered by the ADEA. Accordingly, the theory that § 8335(b) establishes a *per se* BFOQ for all firefighters nationwide does not pass muster under the ADEA, and must be rejected.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted, ,

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FEB 28 1985

ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL.,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.,
Respondents.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI IN NO. 84-518 FILED SEPTEMBER 27, 1984
PETITION FOR CERTIORARI IN NO. 84-710 FILED NOVEMBER 2, 1984
CASES CONSOLIDATED AND CERTIORARI GRANTED JANUARY 14, 1985

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No. 84-518, No. 84-710

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL.,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.,
Respondents.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
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JOINT APPENDIX

RELEVANT DOCKET ENTRIES

United States Court of Appeals for the Fourth Circuit

No. 811965

10/01/81 — CASE DOCKETED. Awaiting ROA. rjb.

9/23/82 — MOTION (I-263) of A for stay treated as a motion to hold case in abeyance pending the Supreme Court's decision in *EEOC v. Wyoming*, filed (CRL:jeh)

10/04/82 — RESPONSE/1tr. of Es to motion I-263, filed. (CRL:fls)

10/07/82 — ORDER holding case in abeyance pending decision in Supreme Court in *EEOC v. Wyoming*, 514 F. Supp. 595 (D. Wyo. 1981), etc., filed. Copy to Brown-Hartman-Gawlik; Lissner; Bekman-Engelman-Cooperman. (1tr.)

4/25/84 — PETITION FOR REHEARING (D-112) and suggestion for rehearing en banc of Es, filed (SAW:jm) Transmitted to HLW, FDM, JDB on 4/27/84 w/copy to entire court.

5/11/84 — ORDER granting motion E-49. A's response to pet. for rehearing due 5/21/84 (BMM:jd) Copy to counsel.

5/23/84 — ANSWER of A to petition for rehearing and suggestion for rehearing en banc filed (SAW:jm) Transmitted to HLW, FDM, JDB w/copy to all circuit judges on 5/25/84.

5/29/84 — ORDER denying petition for rehearing and suggestion for rehearing in banc of Es, filed (LYD:gac).

A. 3

FIRE AND POLICE EMPLOYEES' RETIREMENT
SYSTEM OF THE CITY OF BALTIMORE

Article 22, § 34(a) 1-4, Baltimore City Code (1983):

34. Benefits.

(a) *Service retirement benefits.*

(1) Any member in service may retire upon his written application to the Board of Trustees setting forth at what time, not less than thirty days nor more than ninety days subsequent to the execution and filing thereof, he desires to be retired, provided that the said member at the time so specified for his retirement shall have attained the age of fifty or shall have acquired twenty-five years of service as an employee, and notwithstanding that, during such period of notification, he may have separated from service.

(2) Any member in service who has attained the age of fifty-five shall be retired on the first day of the next calendar month after attaining such age, except that a member who has attained the rank of Fire Lieutenant or Police Sergeant, or equivalent grade as certified by the Department head and approved by the Board of Trustees, shall be retired when he has attained the age of sixty-five.

(3) Anything in this subsection to the contrary notwithstanding, any employee who becomes a member at the time of the establishment of this system, and who is fifty-five, or more years of age, or who will attain the age of fifty-five years before having twenty-five years of service, may be continued in service until the completion of twenty-five years of service, or the attainment of age sixty-five, whichever occurs first.

(4) Further, anything in this subtitle to the contrary notwithstanding, any employee covered by this System, under the rank of Fire Lieutenant or Police Sergeant, or equivalent grade, who was in service on July 1, 1962, may be continued in service until attaining age 60.

EMPLOYEES' RETIREMENT SYSTEM OF THE
CITY OF BALTIMORE

Article 22 § 3(f), Baltimore City Code (1983):

3. Membership.

(f) *Retirement.* The services of any employee, except an elected or appointed official whose term is fixed by law, who attains or has attained the age of seventy (70), and who is not a member of this system shall terminate forthwith. Any member in service who has attained the age of seventy (70), shall be retired forthwith or on the first day of the calendar month next succeeding that in which the said member shall have attained the age of seventy (70) years. However, if the member is an elected or appointed official whose term is fixed by law, he may remain in service as a contributing member subject to the provisions of Section 8(a) until he is not reelected or reappointed.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
INTERNAL MEMORANDUM

August 14, 1980

MEMORANDUM

TO: Leroy D. Clark
General Counsel

FROM: Constance L. Dupre
Associate General Counsel
Legal Counsel Division

SUBJECT: Whether age limitations placed by state and local governments on the employment of police and firefighters are justified by empirical evidence.

Introduction

This memorandum will discuss the propriety of allowing state and local governments to use maximum entry-level age restrictions and mandatory retirement for police and firefighter personnel. The issue arises in the context of the Commission's review of the enforcement policy of the Department of Labor (DOL) with regard to the Age Discrimination in Employment Act of 1967 (ADEA), as amended, 29 U.S.C. § 621 *et seq.* In 1978 the administration and enforcement of the ADEA was transferred from the DOL to the Commission by Reorganization Plan No. 1 of 1978. (See 43 *Fed. Reg.* 19807).

The DOL took the position that arbitrary age restrictions placed on the employment of police and firefighters by state and local governments constituted a violation of the ADEA, primarily because the government employers could not meet the BFOQ test of Section 4(f)(1) of the Act. Accordingly, the DOL had an active enforcement policy against such age restrictions, particularly when a maxi-

imum entry-level age requirement was being used. The position of many state and local governments, on the other hand, is that maximum and minimum hiring ages and a mandatory retirement age are "bona fide occupational qualifications, reasonably necessary to the normal operation of their particular business."¹ (Section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1)). The DOL litigation experience indicates that courts have often been reluctant to deny use of age restrictions where public safety is an issue.² To forestall further judicial approval of hiring and firing limitations that do not meet the BFOQ test, it has been suggested that the Commission institute, pursuant to its rulemaking authority, Section 9 of the ADEA, 29 U.S.C. § 628, an exemption for state and local governmental hiring and retiring limits for the protective occupations. The rationale for providing such an exemption would be that the Commission, by recognizing a

¹ The studies currently available to us do not contain comprehensive statistics on the use of age limits by State and local governments. Generally, however, the upper age limits for hiring range from 32-40 years of age, with the average maxima being age 34. On the other end of the spectrum, a recent survey of 100 large cities shows that 83% use compulsory retirement, generally ranging from ages 50-55. See Flynn & Silver, *Police Selection*, p. 47. While age limitations for both police and firefighters are common practice, there are notable exceptions in both fields, and a lack of uniformity, even from municipality to neighboring municipality.

² See, e.g., *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) (age 40 hiring limit for bus drivers); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), cert. denied sub nom, *Brennan v. Greyhound Lines, Inc.*, 419 U.S. 1122 (1975) (age 35 hiring limit for bus drivers). The case law in the protective service occupations has been less consistent. See *Rodriguez v. Taylor*, 420 F. Supp. 893 (E.D. Pa. 1975) (41 hiring limit for private police invalid as BFOQ); *Aaron v. Davis*, 414 F. Supp. 453 (E.D. Ark. 1976) motion for reconsideration denied, 424 F. Supp. 1238 (E.D. Ark. 1976) (mandatory retirement at 62 for firefighters not justified under BFOQ test). But see *Arritt v. Grisell*, 421 F. Supp. 800 (N.D. W. Va. 1979) (maximum entry age of 35 for police upheld).

reasonable set of age limitations, would be in a better position to challenge age limitations that are overly restrictive, arbitrary, patently unrelated to public safety considerations, and unjustified by available evidence on job-related physical performance requirements.

The question that this memorandum addresses is whether there is evidence to support the Commission giving limited approval, in the form of an exemption, to certain age restrictions for the employment of police and firefighters. The corollary is whether such a compromise is necessary. In response to the latter question, this memorandum will focus on the major alternative to an exemption, i.e., guidelines on individualized testing, and will suggest that job-related physical performance examinations for police and firefighters are a feasible alternative to using chronological age as the sole criterion for restricting the years of employment.

Review Of Relevant Data

The relationship between age and job performance has been addressed in scientific investigations both public and private. This office undertook an informal review of the research material available within the Commission, contacted other federal agencies that have developed expertise in the field of the protective occupations, and received comments and studies from concerned state and local governments. This memo will review the materials from federal, state, and local law enforcement and firefighting agencies, and from experts in the field (Appendix A). This memo will further state what conclusions are supportable by available data, and will make recommendations.

The burden on the Commission to justify enforcing the provisions of the ADEA with respect to state and local governments is not eased by similar age restrictions being available by statute to federal law enforcement and

firefighting agencies. Several months after the 1974 amendments to the ADEA were passed, extending coverage to federal, state and local government employees, Congress passed a law providing that an agent to be named by the President was authorized to approve maximum hiring ages for federal law enforcement and firefighter personnel, and that retirement for such personnel would be mandatory at age 55 or after 20 years service. See Title 5 of the U.S. Code, entitled *Government Organization and Employees*, Sections 3307(d) and 8335(g). Congress justified the state/federal differential with respect to police and firefighters by saying that the entry-level age restrictions are interrelated with and justified by the provisions which authorize early retirement, mandatory retirement and liberal annuity benefits for the same employees. The rationale appears to be that the federal government can insure that when a mandatory retirement age is imposed on certain federal employees in the interest of public safety, the employees thus restricted are liberally compensated. Such a balance may not be struck by local and state governments and thus age restrictions are disallowed, at least without a showing that age is a BFOQ. See S. Rep. No. 93-948, 93rd Cong., 2nd Sess., reprinted in [1974] U.S. Code Cong. Ad. News 3699-3701.

The Civil Service Commission, now Office of Personnel Management, although designated agent to oversee the granting of entry level age restrictions for federal sector firefighters and law enforcement officers, is not comfortable with these provisions and has issued a report to that effect, as has the GAO. These reports will be discussed later in this memorandum. Much of the criticism from within the federal government is useful in rebutting the arguments made for the use of age restrictions on the state and local level. Therefore, we have included in this memorandum material relating to federal age restrictions.

The Commission contracted for a study entitled *Police Selection: Maximum Age Standards: A Review*, by E. Flynn and I. Silver. This study focuses on dispelling the preconceptions surrounding the hiring and retaining of older police personnel. The study cites data on the performance of older police personnel that rebuts many assertions made by proponents of the use of age restrictions.

First, the study points out that police work is a service occupation, not primarily law enforcement in the sense of crime-fighting. The average police person has only an "occasional dangerous event," and in that situation, presence of mind, maturity, good judgment, and even self-esteem, are more important factors to predict successful outcome than physical strength.

This study is a compendium for other studies done on the factors that are a good index of a successful law enforcement career. The primary conclusion is that restricting the entry-level age has no bearing on the future success of the applicant. The conclusions are that there are no reasons to exclude related experience as a hiring factor, that success in the former employment (for instance, armed forces) is an indicator of continued good performance, that older police have a lower rate of civilian complaints, that cities with no maximum hiring limit do not have a higher crime rate, and that older police have a lower rate of absenteeism and turnover.

The study concludes that the stereotypes that pertain to hiring older persons in general — that they are previous occupational failures, unstable, hard to train, incapable of accepting discipline, and physically sub-par, — abound in police literature, but have no basis in fact and have no bearing on the actual performance levels of police personnel. This study further examines the argument that police work itself is so arduous that it necessitates early

retirement. Flynn & Silver point out that police personnel are overweight, have ulcers, bad backs and cardiac problems. These physical problems do not stem from constant fear of danger or from strenuous activity, but rather from the basically sedentary nature of the work and the stress involved in the internal workings of the criminal justice system.

The conclusion of this study is that the arguments used to justify age restrictions do not relate to the physical requirements of the occupation but rather to bureaucratic concerns about the type of recruit (i.e., that young and malleable recruits are desirable) and various pension considerations.

Dispelling The Aging Myth, a report prepared for the Commission by Dr. Paul Davis, provides strong support for the proposition that there are accurate and economical ways to test physical fitness and predict levels of performance for occupations that require strenuous activity, without resort to using age per se as a criterion. Unlike the Flynn & Silver conclusion, that the need for physical prowess in policeman is mythical, Davis believes that firefighters do need to meet a minimal level of fitness. His assertions are somewhat belied by his figures, which show the average firefighter is only marginally more fit than the average American. However, putting aside for a moment the consideration of what standard should be required, the least that the Davis material does is establish that individualized testing is feasible, that firefighting requirements can be quantified, and that an acceptable level of performance can be predicted from test results.

Davis has done studies for the development of a job-related physical performance examination for firefighters for the National Fire Prevention and Control Administration, and has written extensively on the

subject. In one article, Davis not only lists the tests for fitness and coronary risk factors, i.e., EKG-stress test, blood analysis for heart disease risk, pulmonary function, body composition analysis and neuromuscular assessment, but also does a cost analysis on providing a testing and fitness program to lower the rate of premature disabilities, primarily for cardio-pulmonary disease and back injuries associated with excessive body weight. Davis' point is clear: maintaining adequate fitness testing and maintenance not only obviates the necessity to use arbitrary age limits in hiring and retiring, but is cost effective in terms of personnel expenditures for the state or local government.

A telephone call to Dr. Davis provided further information on the current status of testing for firefighting and police personnel. Dr. Davis believes that his extensive testing of active firefighters provides a sufficiently job-related test to make individual predictions with a considerable degree of reliability, albeit that few of those tested have been over age 50. Dr. Davis is less positive about the accuracy of his police personnel test, apparently because it is less tested and keyed not to age, but to sex BFOQ considerations.

Doctor Davis' work seems to indicate that substantial numbers of males in the protective occupations, and at least some of their female counterparts, will be able to pass his tests up to ages 65-70.

The Davis material does show that there is a correlation between advancing age and declining performance, but the decline is more accurately attributed to factors such as increased weight and tobacco consumption, not age. David notes that there are many fit older firefighters who are as qualified as their younger counterparts on the testing level, which supports the proposition that age-blind criteria will weed out the unfit without unduly impairing

the employment opportunities of qualified older individuals. The Davis material casts doubt both on the notion that all or substantially all individuals over a certain age are unqualified, and on the notion that the disqualifying factors are undetectable.

These findings are corroborated by the draft report submitted to the Commission by Donna Cohen and Carl Eisendorfer. Their report, entitled *Police Aging: A Study of Health and Behavior*, attempts to evaluate whether there is any empirical basis for the use of a maximum entry-level age as a selection criterion for police officers. One finding that Cohen and Eisendorfer point to is that the functional age profile showed a marked increase in variation with chronological age, which is further support for the notion that arbitrary age limits do not exclude a group of uniformly unqualified individuals. With numerous references to other studies on alternatives to using chronological age to predict performance, the study concludes that not only is age a less accurate indicator of acceptable job performance than other physiological and psychological variables, but that it is often a positive performance factor.

Cohen and Eisendorfer reiterate what is generally accepted to be true: that scientifically ascertainable factors such as hypertension, although often associated with age, are better predictors of performance standing alone than is age *qua* age.

*Reports and Comments From Other Federal Agencies
and From State And Local Governments*

This office requested copies of reports from the GAO and from OPM, and received informal comments from other agencies. Various state agencies have indicated that studies are being undertaken to support age restrictions currently in use and that they will supply the Commission with their findings. The Commission received a report

from the California Highway Patrol, prepared in defense of its entry level age restrictions and mandatory retirement policy. It relies on the comparable federal restrictions for support and on qualitative data from personal interviews with protective service personnel to illustrate the position that these occupations require youthful incumbents. The state and local agencies have only recently been predicated their defense of age limits on the issue of public safety. It appears that they have yet to develop sophisticated statistical defenses that will be necessary to support the age BFOQ's in the protective occupations. The California report raises one issue of concern, that night vision deterioration supports early retirement of highway patrol persons. However, included in the discussion are strong indications that there are available tests to ascertain when any one individual has fallen below an acceptable level.

The GAO report, *Special Retirement Policy For Federal Law Enforcement and Firefighter Personnel Needs Re-evaluation*, is critical of the current availability of age restrictions in the Federal Government. The criticisms are equally applicable to similar age restrictions used by state and local governments.

The report specifically addresses the question of alternatives to retirement, *e.g.*, individualized testing, and reiterates the position that age restrictions must be job-related in the sense of public safety, not job-related to management considerations.

The GAO came to several conclusions. Although this report is not directed toward state and local community fire departments, it does provide some useful data on older firefighters in general. With respect to federal firefighters, for instance, the GAO report recommends that they be dropped from the early retirement program (ERP) altogether. The report cites statistics that show that because

firefighting is seasonal, many firefighters are not covered by pension plans that have an ERP, and work beyond the age set for covered workers without significant effect on their performance.

This report reiterates that federal age restrictions provide a shorter, more lucrative career for covered employees, thus constituting an "invaluable recruitment and retention vehicle," while being patently unfair to other government employees. The report comes to some of the same conclusions as the OPM report: that additional compensation for hazardous duty should be reflected in pay, not retirement benefits; and that if an employee becomes physically unable to continue performing the duties of his or her job, then he or she should be retired according to accepted disability practices that operate on a case-by-case determination.

The OPM position seems to be that the special retirement policy for federal law enforcement and firefighter personnel resembles disability retirement but the individual employee is not required to show disability. The OPM administrator noted that the special benefits that offset the age limitations are now offered for jobs needing "youthful vigor," whereas the jobs were formerly deemed "hazardous," a distinction that indicates that the age limits have little to do with public safety, and more to do with workforce considerations, i.e., attracting young, career-oriented individuals into government service.

The OPM report, *Staff Paper on the Early Retirement Policy for Federal Law Enforcement and Firefighter Personnel*, questions the need for a preferential early retirement plan (ERP) for law enforcement and firefighter personnel. This report states that the program was originally designed as an incentive for career service, and to foster a youthful workforce for reasons unrelated to the actual physical requirements of at least some of the

protective occupations. The report cautiously recommends retaining the program but with more specific criteria based on job-related physical requirements, thus eliminating the use of the ERP as a career incentive. The report specifically recommends that individuals who gravitate to nonhazardous positions, i.e., supervisor or administrator, be required to fulfill the same civil service requirements for retirement as all federal employees not engaged in hazardous duties.

The study suggests as a solution that higher pay accompany hazardous duty rather than the employee being compensated after retirement. The stated goal of the proposal is to return to what was originally intended — that extraordinary duty that caused an employee to "burn out" would be accompanied by a provision for early retirement. The study makes page after page of alternative proposals all of which have a common theme: that new legislation is required that will restrict automatic separation to those positions which truly require a physically fit incumbent, and that "hazardous" should be the appropriate classification for such occupations.

Other agencies' reactions run according to their use of age restrictions. Departments of Justice and Treasury are in the forefront of those who still believe such restrictions are necessary. It is significant that the Law Enforcement Assistance Administration and the U.S. Fire Administration, on the other hand, support the notion that individualized testing is possible and desirable.

Conclusions On Entry-Level Age Restrictions

The available data indicate that entry-level age restrictions for police and firefighters are not necessary for public safety and that their use as a management tool should be regarded as a violation of the ADEA. The materials in Flynn and Silver, the GAO report, the legislative history of the ADEA, and Davis' work all state

that the primary reason for entry-level requirements is that such restrictions insure a "full career" for pension purposes.

Flynn and Silver point out a subsidiary rationale: that younger applicants fit into the paramilitary mold, are perceived as more easily trainable, less independent. However, Flynn and Silver also point out that the younger police officers, nevertheless, have a higher rate of civilian complaints, a finding that casts doubt on the advisability of denying older, experienced applicants a position.

It should be noted, however, that there are three arguments made in support of entry-level age restrictions that need to be addressed. The first is that such restrictions are necessary to provide a training period that will result in a longer period of qualitatively better performance. The Flynn and Silver study addresses this question directly, as do Cohen and Eisendorfer. The available data indicates that prior experience in a related field is a more than adequate substitute for a specific training period within the occupation. This finding holds true for all of the protective occupations.

The second argument raised in support of entry-level age limitations has to do with predicting physical performance on the basis of risk factors. An individual aged 40 might be able to pass a battery of physical tests designed to estimate his current strength and stamina, but that individual might have in his or her medical record one or more of the factors that correlate to an increased chance of future physical disability, i.e., family history of cardiac disease, hypertension, use of tobacco, etc. For example, an individual aged 55-69 with less than two risk factors has a .69% chance of coronary heart disease, whereas an individual below age 55 but with more than two risk factors present has a 1.29% chance. Leaving aside the question of what percent constitutes a

sufficient basis to raise public safety considerations, the Commission could take the position that an older individual who passed the physical but who was in a high risk category might be denied employment without violating the ADEA, providing that the same standard would apply to younger applicants as well, and the determinations were made on a case-by-case basis, as are disabilities.

The third argument raised is that the cost to the community, in terms of paying disability and retirement costs for hiring an older applicant, is prohibitive. While the Commission should be sensitive to the fiscal concerns of state and local governments, there is sufficient flexibility in the treatment of employee benefit plans under Section 4(f)(2) of the ADEA to accommodate the hiring of older applicants.³ The Commission has currently adopted the DOL's interpretation covering age-based reductions of benefits based on actuarially significant cost considerations, and this provision will remain when the Commission's own interpretations are promulgated.

The studies reviewed generally conclude that entry-level age restrictions are not supported by any empirical basis relating such restrictions to individual performance or public safety. It therefore appears that an exemption for state and local governments is unwarranted.

Conclusions On Mandatory Retirement

The reports and data we have been able to review indicate that while there is convincing evidence that firefighting is an arduous occupation, requiring a certain level of physical fitness, that fitness can be easily measured; that while age is a predictor, other physical factors such as body composition, hypertension, etc. are

³ The report submitted by the California Highway Patrol raises questions of state law that will increase the expense of hiring older applicants. This issue, however, would be more properly addressed at another time.

more accurate indicators; and that there is no longer a need to mandatorily retire those over a certain age.

In terms of the judicially created 3 prong test to establish a BFOQ, the data indicates that even if a certain level of physical fitness is reasonably necessary, there are substantial numbers of older individuals who still qualify, and there are simple and accurate means both to determine current physical condition and to predict future performance levels.⁴

The evidence on the necessity for any arbitrary age restrictions for the occupation of law enforcement officer appears unconvincing. The asserted need for police personnel to be physically fit is belied by the statistics set forth in several of the studies reviewed which show policemen to be, on the whole, fraught with heart and back problems related to the sedentary nature of their employment. The intermittent occurrences requiring physical exertion do not appear to require a youthful police force. Rather, the studies contend and present data to support the view that maturity is an asset in conflict resolution. In addition, while there may be a need to test and control the physical capabilities of foot patrol persons, or the visual acuity of highway patrol persons, these requirements should not be allowed to control the employment of supervisory or administrative personnel. See *EEOC v. City of Janesville*, 480 F. Supp. 1375 (W.D.

⁴ The three part test is 1) that safety is the "essence" of the business, 2) that "all or substantially all" individuals above a certain age possess the disqualifying trait, and 3) that the trait itself is unascertainable on an individual basis. While Congress recognized these elements of the BFOQ test (see S. Rep. No. 95-493 discussed on p. 16 *infra*), it should be noted that the burden of proof on the employer is lighter where public safety is in issue. In the often cited *Hodgson* decision, *supra* n.2, the Seventh Circuit upheld a BFOQ supported only by the employer's good faith judgment that public safety would be effected.

Wisc. 1979). Further, physical performance levels can and should be determined on a case-by-case basis.

As the Silver and Flynn study illustrates, being a police officer is essentially a public service occupation where successful performance is predicated on personal characteristics often unrelated to physical strength, and those individuals who become physically unfit to perform the duties of their position can be retired according to accepted disability procedures.

Conclusion

The available data provide information to answer two questions. One, are higher than average physical fitness standards necessary for police and firefighters? And, if so, are there tests available that will adequately measure the physical requirements of the job? The answer to the latter appears to be yes and the answer to the former is that there is evidence relating to those currently in these occupations indicating that the job requirements are not as stringent as the proponents of age restrictions would have us believe.⁵ Further, legitimate qualifications for these jobs can more accurately be treated as reasonable factors other than age, rather than age as a bona fide occupational qualification.

In sum, statistics appear to be available that can rebut assertions that there are stringent physical demands for police and firefighters that mandate age restrictions. The current physical fitness levels, often tested, and the lack of

⁵ The proponents of the use of age limits have moved from emphasizing physical condition to asserting that the cognitive function deteriorates with accumulated stress and other factors compounded by the aging process. The new emphasis is less susceptible to categorical proof, hence will be more difficult to refute. However, the studies the Commission currently has before it indicate that there is a growing statistical data base that illustrates that experience and maturity more than off-set any deterioration due to aging in a decision situation.

uniformity among state and local governments provide data that substantiate the claim that many older people are physically capable of performing the duties of the various law enforcement and firefighter occupations.

The material we have reviewed would not generally support the Commission in retreating from the position that using chronological age as the sole criterion for denying an individual an employment opportunity violates the ADEA. Even in occupations where age roughly correlates with other physiological factors that do constitute bona fide job-related limitations, there are objective criteria that perform the limiting function more accurately, and without running counter to the intent of the ADEA. Thus, for the Commission to offer an exemption to state and local governments would be to perpetuate arbitrary limits where individualized testing appears to be a feasible alternative.

Recommendations

A. The Commission could consider issuing BFOQ guidelines to which state and local governments could refer on hiring and retiring personnel in the protective occupations, with reference to physical and other types of testing, if relevant to job requirements, and employee benefit planning. There is no reason why age cannot be considered as part of the risk factor analysis on an individual basis, but it can be eliminated as the sole criterion without affecting public safety. There appears to be available a sufficient data base and expert testimony to support holding all private and public employers to the same standard when an age restriction is imposed on employment. In addition, Congress expressly indicated that guidelines would be appropriate to aid employees in determining whether they met the BFOQ standard. *See S. Rep. No. 95-493, 95th Cong., 2nd Sess., 10-12, reprinted in [1978] U.S. Code Cong. & Adm. News 513-514.*

BFOQ guidelines would be preferable either to *ad hoc* litigation or *ad hoc* exemption grants for the reason that the process would conform with generally accepted anti-discrimination principles, i.e., that the burden of proof not be on the individual complaining of discrimination, and that the facts of the particular employment situation be controlling.

If the Commission decides that guidelines would be ineffective, or otherwise undesirable, then it is recommended that we use our rulemaking authority to create an exemption. Such an exemption should include a personal exemption for individual employees and applicants who consider themselves qualified. For example, a similar exemption for individuals is contained in the FAA regulations, although often sought by pilots and never granted. See 14 C.F.R. § 121.381 (the rule) and 14 C.F.R. § 11.25 (the exemption). The danger with using an exemption is that the Commission would be locked into a position that sets an unwelcome precedent. We would be holding ourselves out as an agency with sufficient expertise to establish reasonable age limits, and we would be establishing a presumption in favor of an employer-sought age restriction. However, an exemption within an exemption with a sliding scale and risk factor analysis would create a defensible position.

It is recommended that the Commission coordinate its efforts with the LEAA and the U.S. Fire Administration, other federal agencies that regulate the protective occupations and which have expressed their support for individualized testing replacing arbitrary restrictions of all kinds: age, sex, height, etc.

In addition, it is recommended that the Commission join with GAO and OPM in making known its opposition to the continued use of age restrictions by the federal government for reasons unrelated to public safety. Until such

time as the federal restrictions are lifted, state and local governments will continue to rely on them to substantiate their own age limitations.

APPENDIX A

Resources

1. Flynn and Silver, *Police Selection Maximum Age Standards: A Review*.
2. *Dispelling the Aging Myth*, a report for EEOC by Paul Davis, Director of the Institute of Human Performance. (In addition, various articles by Davis from police and firefighter publications).
3. *Standards in Police Selection*, National Advisory Commission, and pertinent official reports.
4. *State Traffic Officer Max Entry Age Standard Study*, California Highway Patrol (and other enforcement employment data).
5. GAO Report — *Special Retirement Policy for Federal Law Enforcement and Firefighter Personnel Needs Reevaluation* by the Comptroller General. (1977).
6. National Criminal Justice Research Service — 11 reports available on Max Entry level age requirements.
7. *Physical Fitness — II* (Legal Points) police publication of IACP.
8. *The Development of Job-Related Physical Performance Examinations for Firefighters* (a study funded by U.S. Fire Administration).
9. Bureau of Retirement, Insurance, and Occupational Health — (OPM) *Staff Paper on The Early Re-*

irement Policy for Federal Law Enforcement and Firefighter Personnel.

10. *Police Aging: A Study of Health and Behavior*, (in draft) D. Cohen and C. Eisendorfer.

**AFFIDAVIT OF EDWARD C. HECKROTTE, SR.
WITH SURVEY**

STATE OF MARYLAND:

COUNTY OF BALTIMORE: TO WIT:

AFFIDAVIT OF EDWARD C. HECKROTTE, SR.

Edward C. Heckrotte, Sr., being duly sworn, deposes and says:

I am over 18 years of age, competent to be a witness in these proceedings and I have personal knowledge of the facts herein.

I reside at: 5928 Glennor Road, Baltimore, Maryland, 21239.

I am President of Baltimore Fire Fighters, Local 734, IAFF (AFL-CIO) and have held said office since June 20, 1978. Previously, I served as President of said local from 1972 to 1975.

I am also a trustee of the Board of Trustees of the Fire and Police Employees Retirement System of the City of Baltimore and have been a trustee of that system since June 1968. In addition to performing the normal duties required of a trustee, during these years I also have served and been active as Chairman of the Special Investment Committee and also as Chairman of the Actuarial Study Committee of the Board.

On or about January 5, 1981 I sent the attached letter marked as Exhibit A with its questionnaire to all locals of the International Association of Fire Fighters whose membership consisted of over 100 firefighting personnel. I mailed 261 of these questionnaires.

On or about December 31, 1980 and January 21, 1981, I sent the attached letter marked as Exhibit B with its

questionnaire to each state retirement system and to the retirement systems of large cities and populous counties in the United States. My mailings to the state, county and city retirement systems were based on the "Money Market Directory, 1980" published by Money Market Directories, Inc. The directory is regularly used by the Employees Retirement System and the Fire and Police Employees Retirement System of Baltimore City and by their investment managers, advisors and actuaries. I mailed 166 of these questionnaires.

The results of my mailings as of this date, are as follows:

1. Of the 261 questionnaires sent to IAFF unions, 124 were completed and returned.

2. Of the 50 questionnaires sent to state retirement systems and the District of Columbia, 36 were completed and returned.

3. Of the 116 questionnaires sent to county and city retirement systems, 65 were completed and returned.

4. The total number of questionnaires mailed were 427. The total number of questionnaires completed and returned were 225.

5. Based on the replies received, the information reveals the following:

a. Systems requiring mandatory retirement at respective age:

70	— 29
69	— 0
68	— 2
67	— 0
66	— 0
65	— 61
64	— 3

A. 26

63	— 3
62	— 8
61	— 0
60	— 27
59 or below	— 1 (age 55 — Balto.)

b. Systems which have no mandatory retirement age: 33.

c. Number of systems requiring mandatory retirement at different ages based on rank: 6 (all differences being at levels of District Chief, Battalion Chief, Deputy Chief or Chief of Fire Department).

Further, I have prepared a chart showing the mandatory retirement age of firefighters in the 30 largest U.S. cities. Marked as Exhibit C and attached hereto is a copy of a portion of a news article from The Sun of December 19, 1980 listing the 30 U.S. largest cities based on the official 1980 Census. The chart prepared from the information in my survey is attached as Exhibit D. The summary of the results of the 30 largest U.S. cities is as follows:

<i>Mandatory Retirement Age</i>	<i>Number of Cities</i>
70	5
68	1
65	12
64	1
63	2
60	4
No mandatory age	4
Balto. (ages 60 and 55)	1

Only one city in the above group has a different mandatory retirement age based on rank. That is, Pittsburgh which has no mandatory retirement age for the Deputy Chief and Chief and age 65 for all others. Boston has not replied but I have ascertained from other replies

A. 27

received by me from Massachusetts that Boston's fire-fighters are covered by a state law requiring mandatory retirement at age 65.

EDWARD C. HECKROTTE, SR.

Subscribed and sworn to before,
me this 24th day of March, 1981

Doris A. Schott
Notary Public

My Commission Expires: 7/1/82

A. 28

EXHIBIT A

BALTIMORE FIRE FIGHTERS

LOCAL NO. 734

Chartered October 20, 1942

305 W. Monument Street, Suite 310

Baltimore, Maryland 21201

837-4043 or 837-3358

December , 1980

Dear

As President of Baltimore City Fire Fighters, Local 734, IAFF, I am requesting you to complete and return to me as soon as possible the attached questionnaire.

This questionnaire is being sent to every president of a major IAFF Local and the results will be used by me in pending litigation in the U.S. District Court for the District of Maryland in which a number of members of our local have brought suit against the Mayor and City Council of Baltimore under the Age Discrimination in Employment Act.

It is *very important* that the requested information be provided to me and that your answers be *accurate*. In the event that you cannot complete the questionnaire accurately, please refer it to some member of your local who is familiar with the requested information and who can answer with accuracy. Also, since I anticipate using this information in court, it will be necessary for the answer to be acknowledged before a Notary Public.

Thank you in advance for your anticipated cooperation.

Fraternally,

EDWARD C. HECKROTTE, SR.

P.S. If you have any questions about this request, the questionnaire or the use to which this information will be put, please call me and reverse the charges (301) 837-4043 or 837-3358.

E.C.H.

(FOR USE IN LITIGATION IN CASE OF JOHNSON v. MAYOR & CITY COUNCIL OF BALTIMORE, U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND)

RETURN TO: Edward C. Heckrotte, Sr., c/o Local 734
305 W. Monument Street
Baltimore, Maryland 21201

1. Full name, number and address of local union:

2. City, town, municipality, county, district or other governmental unit or area for which it provides firefighting services: _____
3. Number of uniformed employees in your Department:

4. Are the uniformed employees within your Department required by statute, ordinance, state or local law, rule, regulation or collective bargaining agreement to be mandatorily retired at a certain age: Yes ____ No ____
5. If the answer to No. 4 is Yes, at what age is mandatory retirement required? Age ____
6. If mandatory retirement is required at different ages, indicate what ages and which employees: _____

7. Is mandatory retirement age based on rank in Department? Yes ____ No ____

A. 30

8. If the answer to No. 7 is Yes, state the mandatory retirement age for the following ranks:

- a. Firefighters (including drivers, pump operators, engineers, tillermen, paramedics, etc.) Age ____
- b. Sergeants: Age ____
- c. Lieutenants: Age ____
- d. Captains: Age ____
- e. Battalion Chiefs or District Chiefs: Age ____
- f. Deputy Chiefs: Age ____
- g. Others: _____

(Date)

(Signature)

(Title and/or Office)

STATE OF _____, COUNTY OF _____ : to wit:

I HEREBY CERTIFY, that before me, the subscriber, a Notary Public of the County and State aforesaid, personally appeared _____ of the _____ Fire Department, who made oath in due form of law that the matters and facts herein set forth are true and correct to the best of his knowledge, information and belief.

Notary Public

A. 31

EXHIBIT B

BALTIMORE FIRE FIGHTERS

LOCAL NO. 734

Chartered October 20, 1942

305 W. Monument Street, Suite 310

Baltimore, Maryland 21201

837-4043 or 837-3358

December , 1980

Dear

As a Trustee of the Fire and Police Retirement System of Baltimore City, I am respectfully requesting your assistance and cooperation in a project in which I am engaged pertaining to mandatory retirement age of uniformed fire department employees. I would like you to complete and return to me as soon as possible the attached questionnaire.

This questionnaire is being sent to every state retirement system, and the results will be used by me in pending litigation in the U.S. District Court for the District of Maryland (Case No. H 79-998) in which a number of employees of the Baltimore City Fire Department have brought suit against the Mayor and City Council of Baltimore under the Age Discrimination in Employment Act.

It is *very important* that the requested information be provided to me and that your answers be *accurate*. Since I anticipate using this information in court, it will be necessary for the answer to be acknowledged before a Notary Public.

A. 32

Thank you in advance for your anticipated cooperation in this effort.

Sincerely,

EDWARD C. HECKROTTE, SR.

P.S. If you have any questions about this request, the questionnaire or the use to which this information will be put, please call me and reverse the charges (301) 837-4043 or 837-3358.

E.C.H.

(FOR USE IN LITIGATION IN CASE OF JOHNSON v. MAYOR & CITY COUNCIL OF BALTIMORE, U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND)

RETURN TO: Edward C. Heckrotte, Sr., c/o
Baltimore City Fire Fighters, Local 734
305 W. Monument Street
Baltimore, Maryland 21201

1. Full name and address of retirement system: _____

2. Number of uniformed fire department employees covered by your system: _____
3. Are the uniformed fire department employees covered by your system required to be mandatorily retired at a certain age: Yes ____ No ____
4. If the answer to No. 3 is Yes, at what age is mandatory retirement required? Age _____
5. If mandatory retirement is required at different ages, indicate what ages and which employees: _____

A. 33

6. Is mandatory retirement age based on rank? Yes ____
No ____
7. If the answer to No. 6 is Yes, state the mandatory retirement age for the following ranks:
- a. Firefighters (including drivers, pump operators, engineers, tillermen, paramedics, etc.) Age ____
 - b. Sergeants: Age ____
 - c. Lieutenants: Age ____
 - d. Captains: Age ____
 - e. Battalion Chiefs or District Chiefs: Age ____
 - f. Deputy Chiefs: Age ____
 - g. Others: _____

(Date)

(Signature)

(Title and/or Office)

STATE OF _____, COUNTY OF _____ : to wit:

I HEREBY CERTIFY, that before me, the subscriber, a Notary Public of the County and State aforesaid, personally appeared _____ of the _____ Retirement System, who made oath in due form of law that the matters and facts herein set forth are true and correct to the best of his knowledge, information and belief.

Notary Public

EXHIBIT C

THE SUN, FRIDAY, DECEMBER 19, 1980

Baltimore falls from 7th to 9th
in new census

* * * summer, it appeared that Baltimore might be in danger of dropping out of the top 10 cities. Preliminary counts indicated a population of 737,000, but subsequent rechecks put the city's population at more than 780,000.

The city took the Census Bureau to court, alleging an undercount and asking that the agency be ordered to keep open its offices in the city. Although the city won a delay in closing the local offices, census officials contended that the additional count was the result of scheduled checks that would have turned up those people anyway.

The undercount — if there is one — will not alter one basic fact, however: The nation's population is shifting to the Sun Belt, and those states will gain seats in Congress.

In Baltimore, city residents will find themselves sharing their congressional representatives with county residents. Instead of having one district wholly within the city's borders (the 7th), the bulk of another (the 3d) and a small portion of a third (the 2d), the city will have 1½ districts or a major portion of two.

According to the figures released yesterday, the biggest gainers since the 1970 census were cities of the Southwest and California.

El Paso, Texas; Phoenix; San Francisco, and San Jose, Calif., outpaced other cities in growth, according to a list of the nation's 30 most populous communities.

Jumping four places to make the top-30 list for the first time, El Paso placed 28th in the country, with a population of 424,522, bureau officials said.

Here are the 30 most populous cities, with their 1980 total listed first and their 1970 total listed second:

1. New York (final total not available yet, 7,895,563)
2. Chicago (2,999,570; 3,369,357)
3. Los Angeles (2,950,010; 2,811,801)
4. Philadelphia (1,680,235; 1,949,996)
5. Houston (1,554,992; 1,282,443)
6. Detroit (1,192,222; 1,514,063)
7. Dallas (901,450; 844,621)
8. San Diego (870,006; 697,471)
9. Baltimore (783,320; 905,787)
10. San Antonio (783,296; 708,582)
11. Phoenix (781,443; 589,016)
12. Indianapolis (694,046; 740,000)
13. San Francisco (674,063; 715,674)
14. Memphis (644,838; 657,007)
15. Washington (635,185; 756,668)
16. Milwaukee (632,989; 717,372)
17. San Jose (625,763; 461,212)
18. Cleveland (572,532; 750,879)
19. Boston (562,118; 641,071)
20. Columbus, Ohio (561,943; 540,025)
21. New Orleans (556,913; 593,471)
22. Jacksonville, Fla. (541,269; 528,865)
23. Seattle (491,897; 530,831)
24. Denver (488,765; 514,678)
25. St. Louis (448,640; 622,236)
26. Kansas City, Mo. (446,562; 507,330)
27. Nashville (439,599; 447,877)
28. El Paso (424,522; 322,261)
29. Pittsburgh (423,962; 520,089)
30. Atlanta (422,293; 495,035).

This article was compiled with assistance from the Associated Press.

EXHIBIT D

RETIREMENT AGES OF FIRE DEPARTMENT PERSONNEL IN 30 LARGEST U.S. CITIES

Name of City and Population	Number of Fire Dept. Personnel	Mandatory Retirement Age, if any	Difference in Retirement Age, based on rank, if any	Source of Information (Union or Retirement System)
New York	12,000	65	No	New York Retirement System and Local 94
Chicago	4,600	63	No	Chicago Firemen's Annuity & Benefit Fund (Retirement System)
Los Angeles	2,870	No mandatory retirement age	No	Retirement System and Local 112
Philadelphia	2,791	70 (possible 72 upon request)	No	Local 22
Houston	3,000	65	No	Retirement System and Local 341
Detroit	1,325	60	No	Retirement System and Local 344
Dallas	1,481	70 (Retirement System)	No	Retirement System and Local 617
San Diego	901,450	65 (Local)	No	Local 145
Baltimore	729	70	No	See Local Ordinance
San Antonio	1,987	55-60-65	Yes Lieutenants and above — age 65	Local 624
Phoenix	1,030	65	No	Local 493
Indianapolis	833	No mandatory retirement age	No	Local 416
San Francisco	859	65	No	Local 798 and Retirement System

Memphis 644,838	(1,480) (1,500)	60	No	Local 1784 and Retirement System Local 36
Washington 635,185	1,450	64	No	
Milwaukee 632,989	1,048 (1,029)	63	No	Retirement System and Local 215
San Jose 625,763	900	No Reply		
Cleveland 572,532		65 (with extension)	No	Local 92
Boston 562,118	Unknown	65	No	State Law
Columbus, Ohio 561,943	812	No mandatory retirement age	No	Local 67
New Orleans 556,913	964	68	No	Local 632
Jacksonville, Fla. 541,269	758	65	No	Retirement System
Seattle 491,897	980	No mandatory retirement age	-No	Local 27 and Retirement System Retirement System and Local 858
Denver 488,765	916	70	No	Local 42
Kansas City, Mo. 446,562	Unknown	65	No	Retirement System and Local 763
Nashville 439,599	850	60	No	Retirement System and Local 51
El Paso 424,522	510	70 (Retirement System) 65 (Local)	No	Retirement System
Pittsburgh 423,962	1,085	65	Yes No mandatory age for Deputy Chief & Chief	
Atlanta 422,293		No reply		
St. Louis 448,640	869	60	No	Retirement System

FEB 28 1985

IN THE
Supreme Court of the United States
ALEXANDER L. STEVENS
CLERK

OCTOBER TERM, 1984

ROBERT W. JOHNSON, et al.,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, et al.,

Respondents.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF AMICUS CURIAE OF THE AMERICAN
ASSOCIATION OF RETIRED PERSONS IN
SUPPORT OF THE PETITIONERS**

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1984

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Nos. 84-518
84-710

IN THE
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OCTOBER TERM, 1984

ROBERT W. JOHNSON, et al.,

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MAYOR AND CITY COUNCIL OF BALTIMORE, et al.,

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EQUAL EMPLOYMENT OPPORTUNITY
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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**BRIEF AMICUS CURIAE OF THE AMERICAN
ASSOCIATION OF RETIRED PERSONS IN
SUPPORT OF THE PETITIONERS**

I. INTRODUCTION

A. Statement of Interest of Amicus Curiae

The American Association of Retired Persons ("AARP"), of 1909 K Street, N.W., Washington, D.C. 20049, is a not-for-profit membership corporation of more than 18 million persons over the age of 50. AARP is the largest organized group of older Americans in the country. In representing the interests of its members, AARP seeks to: (a) enhance the quality of life for older persons; (b) promote independence, dignity and purpose for older persons; (c) lead in determining the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) represent the point of view of older persons as members of the workforce.

In keeping with its purposes, AARP has devoted itself to investigating and working to alleviate problems resulting from age discrimination, in employment as well as other aspects of life.¹ Many Americans are victims of discriminatory treatment because of age. Such discrimination has been most prominent in the workplace.² Not only is this phenomenon unfair to the individual worker, but it robs the nation of valuable human resources. It is for these reasons that AARP sought the consent of the parties to the submission of this brief *amicus curiae*. See Exhibits 1, 2 and 3.

¹ AARP has recently launched a major campaign to improve the employment opportunities available to older workers. The "Older Worker Advocacy Initiative" has as its five goals to: (a) assess the impact of an aging work force on society; (b) eliminate age discrimination in the work force through legislative, administrative and judicial action; (c) eliminate stereotypes of older workers; (d) assist employers in creating workplace opportunities for older workers; and (e) help older persons make informed employment and retirement decisions.

² The number of suits brought under the ADEA has increased dramatically as awareness of the Act has grown. For example, 9,479 age discrimination charges were filed with the EEOC in 1981, a 76 percent increase over the number of charges filed in 1979. In 1983, 18,087 cases were filed with the EEOC.

While aging is a universal process, it is also a uniquely individual phenomenon. The physiological changes accompanying aging affect different individuals in different ways and at varying times in their lives.³ In recognition of this fact and largely as a result of the efforts of AARP, American society has begun to reevaluate its longheld assumptions about the capabilities of older persons, both in and out of the workforce. Just as it has been recognized that an individual's race or sex provides no basis for judging ability, it is becoming increasingly accepted that an individual's chronological age is not an accurate predictor of his or her ability to perform effectively in the workplace.

In the area of employment, AARP's overriding goal has been the eradication of discrimination based upon adverse stereotypes regarding the competence of older persons. AARP has been in the forefront of efforts to eliminate age discrimination in employment, and has long advocated the elimination of mandatory retirement.⁴

AARP strongly supported the enactment of the Age Discrimination in Employment Act ("ADEA" or the "Act"), 29 U.S.C. § 621-634 (1982), as a means of promoting the employment of older workers and of prohibiting discrimination based upon arbitrary age limits. AARP endorses the basic premise of the Act: that a person's fitness for a job should be based upon the

³ See, H.L. Sheppard & R.E. Rix, *The Graying of Working America: The Coming Crisis of Retirement-Age Policy* (1977), pp. 51-55 (older individuals may help maintain the health status through physical exercise); K. Goldman, *Decline in Organ Function with Age*, *Clinical Geriatrics*, 19-48 (I. Rossman Ed. 1981). (Various systems in body age at different rates; onset of measurable decline in one's capacity varies widely among individuals.)

⁴ See, e.g., AARP Statement on Amending the Age Discrimination in Employment Act Before the Subcomm. on Employment Opportunities of the House Education and Labor Comm., 98th Cong. 2d Sess. (May 17, 1984); AARP Statement in Support of the Prohibition of Mandatory Retirement and Employment Rights Act of 1982, S.2617, Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 97th Cong. 2d Sess. (August 18, 1982).

qualifications of that individual, and that competent individuals who choose to continue working should, by law, be permitted to do so.

B. Preliminary Statement

The decision below will seriously erode the protections that Congress intended to confer upon workers covered by the ADEA.

The Fourth Circuit's decision would effectively bar a class of workers — non-federal employees whose jobs can be likened to those of federal employees to whom the ADEA was not extended — from effectively litigating in their particular cases the *bona fides* of a compulsory retirement age claimed by their employer to be an occupational requirement. Such a result should not be sanctioned. Instead, this Court should reaffirm the right of every employee within the ADEA's intended ambit to continue to subject a purported BFOQ to the form of case-specific factual scrutiny that has heretofore been required under the Act. Simply stated, in holding that when Congress included a mandatory retirement at age 55 for federal firefighting personnel in a federal civil service retirement statute, Congress intended that retirement age to constitute a *bona fide* occupational qualification ("BFOQ") for every firefighter throughout the nation, the lower court misread the intent of that statute and the ADEA.

II. ARGUMENT

A. Congress Did Not Intend Non-Federal Firefighters To Be Subject To the Federal Mandatory Retirement Age As A Matter Of Law

As the basis for its decision that a mandatory 55-year retirement age constitutes a BFOQ as a matter of law for Baltimore firefighters, the Court of Appeals relied upon the circumstance that "[t]he same Congress that extended the ADEA to the states and their political subdivisions reinvigorated the requirement mandating retirement as a general matter at fifty-five for federal

... firefighting employees.”⁶ The court reasoned that Congress would not have adopted a Federal occupational qualification for the civil service retirement statute to which federal firefighters are subject “that is not, or might not be, *bona fide*”.⁷ In consequence, the court concluded as a matter of law that it was required to apply the federal statute’s provisions for age-based compulsory retirement as a “congressional mandate” and “federal standard” to non-federal workers under the ADEA.

In reaching that conclusion, the court neglected to bear in mind another decision by “the same Congress” respecting the ADEA — that when the ADEA was extended generally to the states and their political subdivisions as employers,⁸ it was also made applicable to a number of federal instrumentalities, but not to the agencies hiring federal firefighters.⁹

Because the federal age-55 mandatory retirement standard was enacted for federal employees to whom Congress chose not to extend the protections of the ADEA, the Court of Appeals was mistaken when it assumed that Congress necessarily intended such a retirement provision to serve as a BFOQ benchmark for non-federal employees who are covered by the ADEA.¹⁰ As

⁶ *Johnson v. Mayor and City Council of Baltimore*, 731 F.2d 209, 212 (4th Cir. 1984), cert. granted, 105 S. Ct. 901 (1985).

⁷ *Id.* at 213.

⁸ 29 U.S.C. § 630 (h)(2).

⁹ See 29 U.S.C. § 633 a(a). The majority noted this exception to the scope of the ADEA in passing, 731 F.2d at 211, but its implications were not considered in the majority’s opinion.

¹⁰ Indeed, the legislative history indicates that the relatively youthful age selected by Congress for federal employees’ retirement was intended to serve as a form of reward for exceptionally hazardous federal service, rather than as a BFOQ determination concerning the inability of an older person to perform his duties effectively. See *Stewart v. Smith*, 673 F.2d 485, 487 n.4 (D.C. Cir. 1982) (Public Law 93-350 was intended to improve incentives for early retirement by increasing the annuity value of the first twenty years of service, thereby making early retirement “more economically

this and other courts have made clear, the assessment of the validity of a BFOQ defense to a charge of age-discrimination is subject to a set of strict legal principles respecting the burden of proof and the elements which must be established in order for the defense to prevail.¹⁰ For many non-federal workers, the Fourth Circuit's ruling would reduce those principles to a chimera. That ruling would create the anomalous situation in which an age-based compulsory retirement rule which was intended by Congress to be exempt from the scrutiny provided by the ADEA would preempt the legal analysis prescribed for workers upon whom Congress has explicitly conferred the full panoply of ADEA protections.¹¹ Such a result would be contrary to the intent of Congress in extending the ADEA's coverage to the Baltimore firefighters here.

B. The BFOQ Exception Should Continue To Be Scrutinized On a Case-By-Case Basis

It is clear from the legislative history of the ADEA and the decisions of the courts that an employer's claim that a mandatory

(footnote cont'd.)

practicable."); U.S. Code Cong. & Admin. News (1974), p. 3699 ("The history of retirement legislation dealing with law-enforcement officers and firefighters shows Congressional intent to liberalize retirement provisions so as to make it feasible for these employees to retire at age fifty.").

¹⁰ See, e.g., *EEOC v. Wyoming*, 460 U.S. 226 (1983); *Trans World Airlines v. Thurston*, 104 S.Ct. 613 (1985); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).

¹¹ As the District Court below pointed out in a somewhat different context, a mandatory retirement age could pass muster under an Equal Protection analysis yet fail to qualify as proper under the ADEA. *Johnson v. Mayor and City Council of Baltimore*, 515 F. Supp. 1287, 1302 (D. Md. 1981), cert. denied, 455 U.S. 944 (1982), rev'd, 731 F.2d 309 (4th Cir. 1984), cert. granted, 105 S. Ct. 901 (1985); cf., *Arritt v. Grisell*, 567 F.2d 1267, 1272 (4th Cir. 1977); *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 749 (7th Cir. 1983), cert. denied, 104 S. Ct. 484 (1983) ("mandatory retirement schemes approved by Congress are not subject to the strict requirements of the ADEA, rather such schemes need only be rationally related to a permissible government objective.").

retirement age constitutes a BFOQ should be subjected to an individualized judicial review — based upon the particular cluster of facts and the most recent medical and other expert opinions relating to the specific job at issue.¹³ Here, in what the Court of Appeals termed a “thorough, impeccably reasoned opinion,”¹⁴ the District Court conducted such a fact-specific review and concluded that the compulsory retirement age could not be sustained as a BFOQ. The Court of Appeals’ rejection of that factual analysis, and its application of the federal firefighters’ retirement provisions as a matter of law, are contrary to the proper rules of proof under the ADEA.

If the approach adopted by the Court of Appeals is sanctioned here, the legislative scheme enacted by Congress to guard against age discrimination in employment will be substantially impaired.

In the first place, a worker who seeks to challenge a purported BFOQ and the Court reviewing such a challenge will no longer have an opportunity to rely upon the most up-to-date expert evidence. In this case, the federal retirement rule applied by the Court of Appeals dates from 1974.¹⁵ Since that time, the corpus of medical knowledge concerning older workers has expanded considerably.¹⁶ As the factual record developed in the District Court revealed, a substantial body of medical and other scientific findings bearing upon the capacity of older firefighters

¹³ See, e.g., H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967) 7, reprinted in U.S. Equal Employment Opportunity Commission, *Legislative History of The Age Discrimination in Employment Act 80*; *EEOC v. Wyoming*, *supra*; *Orzel v. City of Wauwatosa Fire Dep’t*, *supra*.

¹⁴ 731 F.2d at 213.

¹⁵ 731 F.2d at 212.

¹⁶ As the District Court noted below, “Because of technical improvements in recent years, physicians can today much more readily test for cardiological problems which a fireman or other similar worker might have.” 515 F. Supp. at 1298 (emphasis added).

to perform their duties has come into being.¹⁶ Indeed, just last year the Chairman of the Select Committee on Aging of the House of Representatives issued a report marshalling the scientific evidence against a mandatory retirement age for firefighters.¹⁷

Were the courts to look only to a years-old statute and its contemporaneous legislative history (including any scientific support relied upon by the draftsmen) to validate a BFOQ, recent and therefore compelling evidence that the statute's premises about the impact of age have become medically obsolete would be excluded from judicial consideration. There is no basis for a belief that Congress intended to insulate any employer's practices from such an up-to-date scientific assessment.

The degree to which the Court of Appeals' approach deviates from the proper ADEA standard is highlighted by the second form of analysis that it would exclude. Every circuit that has considered the BFOQ exception has adopted the two-prong test

¹⁶ See, e.g., 515 F. Supp. at 1298.

¹⁷ *The Myths and Realities of Age Limits for Law Enforcement and Firefighting Personnel*, A Report by the Chairman of the Select Committee on Aging, 98th Cong., 2nd Sess., 9-15 (1984) (House Aging Report). The Report states, "Abilities associated with job performance do not invariably decline with age. As workers age, there is greater variation in their abilities, and in some cases there is improvement of certain skills and abilities with the added experience that comes with age. An individual's ability to perform his or her job can be measured. In fact, research on the job performance of older law enforcement officers and firefighters has shown an improvement in performance among older employees." *Id.*, at 10. It concludes: "Mandatory retirement for competent law enforcement officers and firefighters is unnecessary and wasteful. The federal government's failure to recognize this problem should not be compounded by allowing states and their political subdivisions to also discriminate against their employees based on age. The states and their political subdivisions should, in accordance with the goals of ADEA, test their public safety officers for fitness rather than make stereotyped assumptions of incapacity due to age." *Id.*, at 24. A general review of authorities supporting the conclusion that chronological age is an unsatisfactory predictor of performance is found in Comment, *The Cost of Growing Old: Business Necessity and The Age Discrimination in Employment Act*, 88 Yale L.J. 565, 576-77 & nn. 50-56 (1979).

articulated in *Usery v. Tamiami Trail Tours, Inc.*¹⁸ that in order to prevail on such a defense, the employer "must show that the challenged age qualification is reasonably related to the 'essential operation' of its business and must demonstrate either that there is a factual basis for believing that all or substantially all persons above the age limit would be unable to effectively perform the duties of the job, or that it is impossible or impractical to determine fitness on an individualized basis."¹⁹ This test recognizes the statutory command that a BFOQ must be reasonably necessary to the normal operation "of the particular business. . . ."²⁰

In stark contrast to the case-by-case analysis required by those authorities as well as by this Court's prior decision in *EEOC v. Wyoming*,²¹ the Fourth Circuit here would impose a single nationwide "federal standard" for all firefighters. Such a standard would do more than deprive workers claiming to be subject to age discrimination of an opportunity to adduce current scientific proof in support of their claim. It would also read out of the BFOQ exception the requirement that the occupational qualification relate to the *particular* business at issue, and the employer's burden of proof with respect to the inability of workers above the age limit to perform effectively and the impossibility or impracticability of determining job fitness on an

¹⁸ 531 F.2d 222 (5th Cir. 1976).

¹⁹ See, *Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir. 1984), cert. denied, 105 S. Ct. 513 (1984); *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983), aff'd in part and rev'd in part, *Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 513 (1985); *Arritt v. Grisell*, 587 F.2d 1267 (4th Cir. 1977); *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982); *Orzel v. City of Wauwatosa Fire Dep't.* supra; *Hoefelman v. Conservation Comm'n of Missouri Dep't of Conservation*, 718 F.2d 281 (8th Cir. 1983); *Harris v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980); *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982).

²⁰ 29 U.S.C. §623(f)(1).

²¹ 460 U.S. 228 (1983).

individualized basis.²³

The Court of Appeals erred in failing to recognize that jobs with the same broad title such as "firefighter" may in actuality involve markedly differing working conditions, duties and physical and mental demands.²⁴ Establishing a unitary nationwide "federal standard" for any broad job classification as a matter of law would frustrate Congress' intent to provide each older worker with the right to effectively challenge an age-based compulsory retirement rule in the factual context of his particular job.²⁴

²³ The importance and fairness of basing each decision upon the specific facts governing the individual business is underscored by this case, where the City of Baltimore did not attempt to show that the plaintiffs were not qualified to perform their particular duties. As the district court stated: "The evidence presented indicates that all five of these plaintiffs are today as qualified as younger employees of the Department to perform their duties as firefighters. Indeed, defendants have not sought to introduce any evidence to indicate that any one of the plaintiffs cannot carry out his assigned duties because of physical or other reasons." *Johnson v. Mayor and City Council of Baltimore*, 515 F. Supp. at 1287, 1296. The court went on to emphasize that, "defendant's own evidence indicates that Fire Department personnel with cardiac problems can be evaluated on an individualized basis. . . ." *Id.*, at 1299.

²⁴ Other courts have understood that differences between similarly-denominated jobs require separate BFOQ reviews. Illustrative of those courts' reluctance to apply a BFOQ to any employee group other than workers covered by the initial employer is *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982), which reversed the district court's decision to expand a Federal Aviation Authority's age-60 retirement rule for airline pilots to cover pilots of private corporate aircraft.

²⁴ This is not to say that the federal retirement rule should be disregarded. Instead, it should be given due consideration as evidence of one employer's judgment regarding the capacities of older firefighters based upon what that employer requires from them, a view to be balanced against evidence of contrasting practices on the part of other employers. As the District Court noted below, of the thirty largest cities in the United States, four have mandatory retirement at age 60 while twenty-two do not require retirement until age 65 or beyond. 515 F. Supp. at 1297. With such diversity among major employers of firefighters, it cannot be said that the conditions which led Congress ten years ago to require retirement at 55 are necessarily duplicated in all cities throughout the nation today.

In sum, a case-by-case, fact-specific determination of the BFOQ defense should be retained to ensure that only justifiable age-based limitations will survive judicial scrutiny, and that impermissible age-based discrimination will be eliminated in accordance with the objectives of ADEA.

III. CONCLUSION

The decision below should be reversed.

Respectfully submitted,
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*Attorneys for The American
Association of Retired Persons*

Of Counsel:
STEVEN ZALEZNICK
DAVID CERTNER
PETER SCOTT

Dated: New York, New York
February 28, 1985

Exhibit 1

Letterhead of
U.S. Department of Justice
Office of the Solicitor
Washington, D.C. 20530

February 20, 1985

Steven Zaleznick, Esq.
American Association of Retired Persons
1909 K Street, N.W.
Washington, D.C. 20049

Re: *Johnson, et al. v. Mayor and City Council of
Baltimore*, Nos. 84-518 and 84-710

Dear Mr. Zaleznick:

As requested in your letter of February 13, 1985, I hereby consent to the filing of a brief *amicus curiae* on behalf of the American Association of Retired Persons.

Sincerely,

/s/

Rex E. Lee
Solicitor General

Exhibit 2

Letterhead of
Kaplan, Heyman, Greenberg,
Engelman & Belgrad, P.A.
Tenth Floor — Sun Life Building
20 South Charles Street
Baltimore, Maryland 21201

February 20, 1985

Steven Zaleznick, Esquire
American Association of Retired Persons
1909 K Street, N.W.
Washington, D.C. 20049

Re: *Robert W. Johnson, et al. vs. Mayor and City
Council of Baltimore, et al.*

Dear Mr. Zaleznick:

Thank you for your letter of February 13, 1985 in which you indicated that AARP requests permission to file a brief amicus curiae on behalf of the Petitioners in the above matter. We have no objection and welcome any assistance.

Kindly feel free to contact me if you would like to discuss the substance of the case.

Very truly yours,

/s/

William H. Engelman

WHE:dmz

Exhibit 3

Letterhead of
City of Baltimore
William Donald Schaefer, Mayor
Department of Law
Benjamin L. Brown, City Solicitor
101 City Hall
Baltimore, Maryland 21202

February 25, 1985

Steven Zaleznick
Attention: Peter Greenwald
Miller, Singer & Raives, P.C.
555 Madison Avenue
New York, New York 10022

Dear Mr. Zaleznick:

The City of Baltimore hereby consent to the filing of a brief amicus curiae by The American Association of Retired Persons on behalf of Petitioners in the case *Robert W. Johnson, et. al. v. Mayor and City Council of Baltimore, et. al.*

Sincerely,

/s/

Ambrose T. Hartman
Deputy City Solicitor

ATH/cd



In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL., PETITIONERS

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF FOR THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

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QUESTION PRESENTED

Whether the City of Baltimore's plan requiring involuntary retirement of its firefighters at ages 55 and 60 satisfies the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, in the absence of a factual showing that age is a bona fide occupational qualification for the job, solely because a federal civil service retirement statute, 5 U.S.C. 8335(b), generally requires the retirement of *federal* firefighters at age 55.

PARTIES TO THE PROCEEDING

August T. Stern, Jr., Thomas C. Doyle, Mitchell Paris, Robert L. Robey, and James Lee Porter are also petitioners in No. 84-518. Hyman A. Pressman, Donald D. Pomerleau, Calhoun Bond, Edward C. Heckrotte, Sr., Charles Daugherty, Paul C. Wolman, Jr. and Curt Heinfeldt are Members of the Board of Trustees of the Fire and Police Employees Retirement System of the City of Baltimore. They were defendants in the trial court and are respondents here.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-518

ROBERT W. JOHNSON, ET AL., PETITIONERS

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

No. 84-710

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

*ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

**BRIEF FOR THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)¹ is reported at 731 F.2d 209. The opinion of the district court (Pet. App. 22a-53a) is reported at 515 F. Supp. 1287.

¹ "Pet. App." refers to the appendix to the petition in No. 84-710.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1984. A petition for rehearing was denied on June 29, 1984 (Pet. App. 21a). On September 20, 1984, the Chief Justice extended the EEOC's time within which to file a petition for a writ of certiorari to and including November 26, 1984. The petitions for a writ of certiorari were filed on September 27, 1984 (No. 84-518), and November 2, 1984 (No. 84-710), and were granted on January 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623, provides in pertinent part:

(a) Employer Practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * * * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; seniority system employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c),

or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

5 U.S.C. 8335(b) provides:

A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the

consent of the employee, until the last day of the month in which the 60-day notice expires.

Article 22, Section 34(a) of the Baltimore, Md. Code (1983) is reproduced at J.A. 3.

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, prohibits employers from discriminating against persons aged 40 to 70 on the basis of age by, inter alia, discharging them or requiring them to retire involuntarily. §§ 4(a)(1) and 12(a) of the ADEA, 29 U.S.C. 623(a)(1) and 631(a). Termination prior to age 70 may be required on the basis of an employee's age only where age has been shown to be "a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of a particular business * * *." § 4(f)(1), 29 U.S.C. 623(f)(1). In 1974, the ADEA was amended to extend these prohibitions to state and local government employers. §§ 11(b), 15, 29 U.S.C. 630(b), 633a. In 1978, the ADEA was amended again to make clear that mandatory retirement before the age of 70 is prohibited, absent proof of a BFOQ, even if accomplished pursuant to a bona fide pension plan. Pub. L. No. 95-256, § 2(a), 92 Stat. 189; see § 4(f)(2), 29 U.S.C. 623(f)(2).

2. Six firefighters brought this action in the United States District Court for the District of Maryland challenging the City of Baltimore's municipal code provisions that establish an involuntary retirement age for firefighters and police personnel. The plaintiffs claimed that those provisions violate the ADEA. The Equal Employment Opportunity Com-

mission (EEOC) subsequently intervened in support of the plaintiffs. Pet. App. 1a-2a, 22a-23a.

Prior to 1962, Baltimore firefighters were covered by the same retirement system applicable to all Baltimore employees, the Employees Retirement System (ERS), which provided for mandatory retirement at age 70. Pet. App. 2a; J.A. 4. In 1962, the City of Baltimore established the current Fire and Police Employee Retirement System (FPERS) (Baltimore, Md., Code art. 22, § 34 (1983); J.A. 3) for uniformed personnel who previously had been covered by the ERS. The FPERS generally requires all firefighters below the rank of lieutenant to retire at age 55; lieutenants may work until 65. The system makes special provision for firefighters hired before 1962, who were given the option of transferring into the FPERS or remaining in the ERS. Such firefighters below the rank of lieutenant who are presently covered by the FPERS system may work until age 60 (or, in certain limited circumstances, until age 65). § 34(a)(3) and (4); J.A. 3; see Pet. App. 24a-25a. Firefighters hired before 1962 who elected to remain in the ERS may work until age 70 (*id.* at 32a). The plaintiffs here include five firefighters covered by the grandfather clause who are subject to retirement at age 60, and one firefighter hired after 1962 who is subject to retirement at age 55 (*id.* at 25a-26a).²

The defendants [hereinafter referred to as respondents] asserted as an affirmative defense that age is a BFOQ for the position of firefighter and

² The plaintiffs did not argue that a retirement age of 65 would violate the ADEA. Essentially, they sought the same retirement age applicable to lieutenants. See Pet. App. 39a & n.9.

hence that the mandatory retirement provision was permitted under Section 4(f)(1) of the ADEA, 29 U.S.C. 623(f)(1). A trial was held, at which both sides presented expert and nonexpert testimony in support of their positions regarding the validity of the BFOQ defense. The district court held that respondents had failed to show that age was a bona fide occupational qualification reasonably necessary to the normal operation of the fire department.³ The court applied the BFOQ test developed in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (5th Cir. 1976), and later adopted by the Fourth Circuit, which required respondents to show (1) that the job qualification was " 'reasonably necessary to the essence of its business' of operating an efficient fire department * * * and (2) that [respondents] have 'reasonable cause, i.e., a factual basis for believing that all or substantially all persons within the class * * * would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis' " (Pet. App. 36a-37a, quoting *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977)).

Specifically, the court rejected respondents' contention that substantially all firefighters would be unable to perform their duties safely and efficiently after they reached the age of 60.⁴ With respect to the

³ The court also rejected respondents' contentions that application of the ADEA to them violates the Tenth Amendment (Pet. App. 29a-31a) and that the five plaintiffs who had elected to be covered by the FPERS had thereby waived the present ADEA claim (*id.* at 31a-34a).

⁴ The district court's discussion pertained principally to the five plaintiffs who were subject to mandatory retirement at

five plaintiffs who were over age 60, the court found the evidence “overwhelming that plaintiffs have not only performed satisfactorily since they became sixty, but in most instances their performance has been more than satisfactory and even exceptional” (Pet. App. 40a).⁵ The court further found that the “evidence presented indicates that all five of these plaintiffs are today as qualified as younger employees of the Department to perform their duties as firefighters,” noting that respondents had not even “sought to introduce any evidence to indicate that any one of the plaintiffs cannot carry out his assigned duties because of physical or other reasons” (*ibid.*).

In addition to the condition of the individual plaintiffs, the court examined the general workings of the Baltimore Fire Department, noting that “historically Baltimore firemen have always worked past [age 60] and even up to age seventy” (Pet. App. 41a). The court found that firefighters who elected in 1962 to remain covered by ERS and therefore worked past age 60 continued to perform their duties satisfactorily and “in no way affected the high caliber of the services performed by the Baltimore City Fire Department” (*ibid.*). The court further found that the lowering of the mandatory retirement age was par-

age 60 because of the grandfather clause included in FPERS. The court noted that the conclusion that an age limit of 60 could not be a BFOQ led, a fortiori, to the conclusion that retirement at age 55 could not be justified as a BFOQ (Pet. App. 50a).

⁵ After plaintiff Johnson’s involuntary retirement, the district court, with respondents’ consent, entered a temporary restraining order reinstating him to his position and prohibiting future mandatory retirements of the other named plaintiffs. Thus, the plaintiffs continued to serve as firefighters after they reached age 60. See Pet. App. 23a.

ticularly difficult to justify because the burdens undertaken by older firefighters were not as severe as in the past as a result of the shortening of the work week (from 66 hours to 48 hours) and technological improvements over the years, especially the development and use of oxygen breathing apparatus (*id.* at 42a).⁶

Finally, the court rejected respondents' argument that mandatory retirement at age 55 or 60 is the most reliable way of removing employees suffering from coronary disease (Pet. App. 42a-49a). The court concluded that respondents had not met their burden of proving that it is impossible or impractical to deal with the retirement of firefighters over age 60 on an individualized basis, finding the plaintiffs' expert testimony on this point "much more convincing" than that of respondents (*id.* at 43a). The plaintiffs' evidence indicated that chronological age is appropriately considered, but it is not determinative of an individual's ability to perform a firefighter's duties, and that exercise tolerance tests, supplemented by other tests and procedures, can be used at relatively little expense to determine whether a firefighter is physically and medically fit to perform his job (*id.* at 43a-45a). Even respondents' own evidence, the court concluded, indicated that firefighters with cardiac problems can be evaluated on an individualized basis and retired if necessary (*id.* at 46a).

⁶ The court also noted that a survey of the fire departments in 30 of the Nation's largest cities indicated that 22 had mandatory retirement ages of 65 or older or no mandatory retirement age at all, three had mandatory retirement ages of between 60 and 65, and four had a mandatory retirement age of 60. Pet. App. 42a & n. 14. Baltimore was alone in requiring retirement at age 55.

3. A divided panel of the court of appeals reversed (Pet. App. 1a-20a).⁷ The court did not take issue with the district court's factual findings that respondents had failed to prove that age was a BFOQ for firefighters,⁸ but the court held that respondents were entitled to the BFOQ defense as a matter of law. The court of appeals relied on a passage in *EEOC v. Wyoming*, 460 U.S. 226, 240 (1983), in which this Court characterized the prohibitions of the ADEA, in conjunction with the BFOQ exception, as not overriding entirely a state's discretion to impose a mandatory retirement age, but rather merely testing that discretion "against a reasonable federal standard" (Pet. App. 5a-6a). Finding a need to "search for a 'reasonable federal standard'" (Pet. App. 6a), the court of appeals located that standard in a federal civil service statute, 5 U.S.C. 8335(b), which requires certain federal law enforcement officers and firefighters to retire at age 55 if they have sufficient years of service to qualify for a pension and their agency does not find that it is in the public interest to continue their employment. The court of appeals held that since Congress had selected age 55 as the retirement date for most federal firefighters, it followed that Congress recognized age 55 as a BFOQ for firefighters. Hence, the court concluded, age 55 necessarily constituted a BFOQ for all state and local firefighters as well, and therefore respondents were not required to

⁷ Respondents filed a petition for certiorari before judgment, which was denied. 455 U.S. 944 (1982).

⁸ Indeed, the court of appeals characterized the district court's decision as a "thorough, impeccably reasoned opinion" (Pet. App. 8a).

make any factual showing at trial as to the need for a mandatory retirement age of 55. Pet. App. 6a-8a.⁹

The court added that its statutory interpretation establishing age 55 as a *per se* BFOQ for firefighters was "compelled further" by the desire to avoid "serious constitutional questions" (Pet. App. 9a). The court identified three such questions: (1) whether Section 5 of the Fourteenth Amendment authorized the extension of the ADEA to state and local governments (Pet. App. 8a-10a); (2) whether the Commerce Clause authorized the application of the ADEA to Baltimore firefighters (*id.* at 11a-12a); and (3) whether judicial factfinding concerning the validity of age as a BFOQ would violate the separation of powers doctrine where "Congress has, in 5 U.S.C. § 8335(b), adopted a legislative answer" to that question (*id.* at 13a).

Chief Judge Winter dissented (Pet. App. 16a-20a). He rejected the majority's conclusion that 5 U.S.C. 8335(b) demonstrated a congressional determination that age 55 is a BFOQ for federal firefighters, stating that the language and legislative history of the statute "belie[] the existence of congressional intent * * * to fix age fifty-five as a BFOQ" (Pet. App. 18a). Moreover, Chief Judge Winter stated, whether or not age 55 was established as a BFOQ for federal firefighters is irrelevant to interpreting the ADEA. He pointed out that this Court had already rejected in *EEOC v. Wyoming*, *supra*, the argument that Congress's treatment of federal civil service employees could constrict the broad requirements

⁹ The court of appeals distinguished *EEOC v. Wyoming*, *supra*, which was remanded for a trial on the BFOQ issue, on the ground that "[n]o comparable federal statute exists insofar as federal game wardens are concerned" (Pet. App. 8a).

of the ADEA. Pet. App. 19a-20a. Chief Judge Winter concluded that "the fact that Congress may require some federal firefighters to retire at age fifty-five does not excuse Baltimore from providing the facts necessary to satisfy" the BFOQ defense (*id.* at 20a).

SUMMARY OF ARGUMENT

A. In furtherance of its goal to encourage the making of employment decisions on the basis of individual abilities rather than age stereotypes, the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, prohibits mandatory retirement prior to age 70. The Act contains one general exception to this prohibition; an employer may discriminate on the basis of age if age is a "bona fide occupational qualification" for the job. 29 U.S.C. 623(f) (1). The BFOQ exception is a narrow one designed to accommodate unusual circumstances to which the Act's strictures should not apply. The essence of the BFOQ defense is a showing that the employer has a "factual basis" for believing that the age-related job qualification is necessary because testing of individual abilities is not possible. This requirement that the employer make a factual showing of the necessity for the age limit comports with the statutory scheme and reflects Congress's expressed understanding of the BFOQ exception, even with respect to hazardous occupations. Thus, the court of appeals' holding that a BFOQ defense is established as a matter of law for a large class of state and local government employees because of a distinct federal civil service statute, without any factual evidence of necessity for the mandatory retirement provisions, is directly contrary to the clear thrust of the ADEA.

This Court's decision in *EEOC v. Wyoming*, 460 U.S. 226 (1982), confirms the factual nature of the

BFOQ defense. The Court noted in *Wyoming* that the ADEA did not completely ban a state from imposing mandatory retirement; it simply held the state's action up to a "reasonable federal standard," i.e., the BFOQ exception set forth in the Act. *Id.* at 240. The Court remanded *Wyoming* to allow the State to prove at trial that age was in fact a BFOQ, recognizing that the defense requires a factual showing of necessity. The court of appeals completely misunderstood *Wyoming* in holding that it requires a court to search outside the ADEA for a "reasonable federal standard" to apply to the particular case, a search that here settled on a civil service statute governing federal firefighters. This approach substitutes chaos for the uniform BFOQ standard established by Congress and undermines the basic structure of the ADEA by permitting mandatory retirement in the absence of a factual showing that age is a BFOQ.

B. 1. The text of the ADEA leaves no room for an implied exception based on the treatment accorded similar federal employees. In addition to the general BFOQ defense, the Act contains certain limited exceptions for specified occupations, so Congress presumably would have similarly provided expressly for an exception based on treatment of analogous federal employees if it had desired to enact one. Moreover, established principles of statutory construction compel rejection of the court of appeals' reading of the statute. As an exception to a remedial statute permitting the very conduct the Act generally prohibits, the BFOQ defense should be narrowly construed. And the contemporaneous and consistent administrative interpretation of the BFOQ exception emphasizes the need for a factual showing of necessity and clearly reflects the view that age has not been established as a per se BFOQ for state and local firefighters.

The legislative history of the 1978 amendments to the ADEA establishes beyond doubt that Congress did not intend to recognize age as a BFOQ for local firefighters younger than 70, even though it retained the mandatory retirement provision for federal firefighters. The decision to retain 5 U.S.C. 8335(b) did not reflect any view of the merit of that provision; it was based solely on a desire to expedite passage of the ADEA while allowing the congressional committees with jurisdiction over the federal retirement programs at issue the opportunity to review those provisions. The sponsor of the amendment retaining federal mandatory retirement, and others who spoke in its support, specifically disclaimed the possibility that their proposal reflected approval of the mandatory retirement provisions.

EEOC v. Wyoming, supra, establishes that federal civil service statutes are not relevant to interpreting the ADEA. The Court there specifically rejected the State's contention that the federal statute demonstrated that the federal interest in the ADEA was insufficient to justify applying it to state employees, explaining that the ADEA must be read on its own terms, not by reference to other statutes. The Court stated (460 U.S. at 243 n.17): "Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decision-making a conclusion that Congress was insincere in that declaration * * *." The ADEA itself clearly establishes that mandatory retirement is permissible only if age is proven to be a BFOQ, and it clearly demonstrates that Congress deliberately drew distinctions between federal and nonfederal employees

(see 29 U.S.C. 630(b), 633a); hence, 5 U.S.C. 8335(b) cannot be read as establishing a per se BFOQ for state employees under the ADEA.

2. In any event, 5 U.S.C. 8335(b) does not reflect a congressional finding that age is a BFOQ even for federal firefighters. The statute requires retirement at 55 only if the employee has 20 years of service, and his supervisor may waive the requirement; therefore, it is apparent that Congress recognized that firefighters can continue to perform effectively and safely after age 55 and that individualized determinations of fitness are possible.

The reasons underlying the enactment of the federal mandatory retirement provision confirm that it does not establish age as a BFOQ. One purpose was to preserve a young workforce for hazardous occupations, but Congress apparently relied on traditional age stereotypes in establishing mandatory retirement; it made no factual findings concerning the inability of older persons to perform their duties effectively (as the ADEA would require to establish a BFOQ). The other reasons for the legislation were to advance policies that have nothing to do with qualifications to serve as a firefighter. It is thus manifest that Congress did not find that age is a BFOQ for firefighters as that term is used in the ADEA, and therefore it is wholly inappropriate to read 5 U.S.C. 8335(b) as establishing a per se BFOQ for state employees. To the extent there is tension between the policies of the two statutes, that is a matter for Congress to resolve.

ARGUMENT**FEDERAL LAW DOES NOT PERMIT THE ESTABLISHMENT OF AGE 55 AS A MANDATORY RETIREMENT AGE FOR LOCAL FIREFIGHTERS IN THE ABSENCE OF A FACTUAL SHOWING THAT SUCH AN AGE LIMIT IS A BONA FIDE OCCUPATIONAL QUALIFICATION**

The overriding purpose of the Age Discrimination in Employment Act is to eliminate unjustified denial of employment opportunities to older persons. The ADEA is designed to ensure that employment decisions are made on the basis of individual ability, rather than stereotypes based on age. See 29 U.S.C. 621(b). To that end, the Act generally prohibits the establishment of mandatory retirement ages under 70, with the exception that mandatory retirement is permitted if the evidence demonstrates that age is a bona fide occupational qualification for a given job.

The decision of the court of appeals seriously undermines this statutory purpose by upholding mandatory retirement for a large class of employees in the absence of evidence demonstrating that age is a BFOQ. The court's conclusion that this result was intended by Congress because an unrelated statute in some circumstances requires retirement of federal firefighters at age 55 is flawed in several respects. There is no basis for inferring that Congress desired the protections of the ADEA to be limited by the manner in which federal workers are treated. Indeed, as this Court recognized in *EEOC v. Wyoming*, 460 U.S. 226 (1983), the legislative history of the ADEA makes clear that Congress intended the ADEA to stand as an independent unit, unaffected by the provisions of federal civil service statutes. In any event, the federal statute relied upon by the court of appeals does not represent a congressional finding

that age is a BFOQ even for federal firefighters, and thus it can hardly be invoked to justify Baltimore's mandatory retirement age.

A. The ADEA Generally Prohibits Mandatory Retirement Prior to Age 70 Unless The Facts Demonstrate That Age Is A BFOQ

1. The ADEA is a remedial statute intended by Congress "to promote employment of older persons based on their ability rather than age * * *." 29 U.S.C. 621(b). When first enacted in 1967, the Act prohibited age discrimination, but it was interpreted to allow mandatory retirement provisions as part of a pension plan. See *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977). Concluding that "[m]andatory retirement works severe injustices against the aged" (S. Rep. 95-493, 95th Cong., 1st Sess. 3 (1977); EEOC, *Legislative History of the Age Discrimination in Employment Act* 436 (1981) (Leg. Hist.)), however, in 1978 Congress amended the ADEA to prohibit "the involuntary retirement of any individual [less than 70 years of age] * * * because of the age of such individual." 29 U.S.C. 623(f)(2). This amendment was deemed necessary to advance the statute's primary policy that "people should be treated in their employment on the basis of their individual ability to perform a job rather than on the basis of stereotypes about * * * age." S. Rep. 95-493, *supra*, at 3; Leg. Hist. 436. Thus, the mandatory retirement policy being defended by respondents here runs contrary to the "primary purpose" of the 1978 Amendments. H.R. Rep. 95-527, 95th Cong., 1st Sess., Pt. 1, at 1 (1977); Leg. Hist. 361.

The ADEA's prohibition against mandatory retirement prior to age 70 is not monolithic. The Act con-

tains minor exemptions for certain employees in executive positions, who may be subject to mandatory retirement after age 65, and for state government policymakers. 29 U.S.C. 630(f), 631(c)(1).¹⁰ And Congress recognized the possibility that other exemptions from its requirements might be found to be appropriate after further study; therefore the ADEA empowers the EEOC to "establish such reasonable exemptions to and from any or all provisions of [the Act] as [it] may find necessary and proper in the public interest." 29 U.S.C. 628.¹¹ The only exception to the prohibition against mandatory retirement that is of general applicability, however, is the BFOQ exception, which provides that a mandatory retirement age prior to 70 may be established if "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. 623(f)(1). See also 29 U.S.C. 633a(b) (EEOC can make BFOQ determinations for federal employees).

The BFOQ exception was established in order to accommodate unusual circumstances in which the general prohibitions of the ADEA ought not to ap-

¹⁰ The 1978 amendments also added a provision that excepted tenured professors above age 65 from the mandatory retirement prohibition. Pub. L. No. 95-256, § 3(a), 92 Stat. 190. This provision was designed to exist for only a few years, and it automatically became repealed on July 1, 1982. Pub. L. No. 95-256, § 3(b)(3), 92 Stat. 190.

¹¹ Pursuant to this authority, the EEOC examined the desirability of fixing a retirement age for local firefighters and police officers. After preliminary study, the EEOC concluded that such an exemption from the Act was not appropriate because of, *inter alia*, the feasibility of making individualized assessments of fitness and the fact that age alone is a poor indicator of ability. See J.A. 5-23.

ply,¹² but it plainly was not intended to undermine the fundamental goal of the Act to eliminate employment decisionmaking based on age stereotypes rather than actual abilities. The exception was patterned after the BFOQ exception contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which this Court has described as an "extremely narrow exception." *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). And the courts of appeals that have applied the BFOQ exception in ADEA cases have similarly recognized its narrow application. See, *e.g.*, *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 748 (7th Cir. 1983), cert. denied, No. 83-205 (Nov. 28, 1983); *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), cert. denied, 456 U.S. 1007 (1982).

The test first set forth in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), for finding a BFOQ has been universally adopted by the other courts of appeals that have considered the question.¹³ That test requires the employer to show that

¹² At the hearings on the ADEA, the Secretary of Labor recognized that there could be some instances in which age is relevant to job performance, and hence the BFOQ exception was included in the Act, but he advised Congress that those instances would occur rarely and that in almost all occupations individual assessments of ability could be made. *Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess. 9 (1967); Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 38, 51-52 (1967).*

¹³ See *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d at 753; *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 844-846 (6th

its job qualifications are "reasonably necessary" to its business and that it has a "factual basis" for believing either that all workers above a certain age are unqualified or that individual testing is not possible. 531 F.2d at 236. The requirement that the BFOQ exception be supported by a specific factual showing comports with Congress's intent that the "case-by-case basis should serve as the underlying rule in the administration of the [ADEA]" (H.R. Rep. 805, 90th Cong., 1st Sess. 7 (1967); S. Rep. 723, 90th Cong., 1st Sess. 7 (1967); Leg. Hist. 80, 111), thus furthering the goal of ending "the setting of arbitrary age limits regardless of potential for job performance" (29 U.S.C. 621(a)(2)).¹⁴ Accord-

Cir. 1982); *Stewart v. Smith*, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982); *EEOC v. County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), cert. denied, 434 U.S. 966 (1977). The BFOQ standard is currently under consideration by this Court in *Western Air Lines, Inc. v. Criswell*, No. 83-1545 (argued Jan. 14, 1985).

¹⁴ Shortly after the ADEA was first enacted, the Department of Labor (the task of administering and enforcing the Act was transferred from the Department of Labor to the EEOC pursuant to Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978)) issued guidelines concerning the BFOQ defense (29 C.F.R. (1968 ed.) 860.102(b); 33 Fed. Reg. 9172 (1968)):

Whether occupational qualifications will be deemed to be "bona fide" and "reasonably necessary to the normal operation of the particular business," will be determined on the basis of all the pertinent facts surrounding each particular situation. It is anticipated that this concept of a bona fide occupational qualification will have limited scope and application. Further, as this is an exception it must be construed narrowly, and the burden of proof

ingly, the courts have recognized that this prerequisite of a particularized evidentiary showing to establish a BFOQ is essential to maintaining the integrity of the statutory prohibition. See, *e.g.*, *Heiar v. Crawford County*, 746 F.2d 1190, 1197 (7th Cir. 1984); *EEOC v. County of Santa Barbara*, 666 F.2d 373, 376 (9th Cir. 1982).

In the course of considering the 1978 amendments to the ADEA, Congress confirmed its view that a factual showing of business necessity was a prerequisite to establishing a BFOQ defense for a broad rule requiring involuntary retirements. The Senate version of the 1978 amendments would have added to Section 4(f)(1) of the Act a phrase expressly making the BFOQ defense applicable to mandatory retirement provisions. See Leg. Hist. 474. While that amendment ultimately was not enacted, it was only because it was agreed that "the amendment neither added to nor worked any change upon present law," *i.e.*, the BFOQ provision in the statute was already applicable to mandatory retirement without the need for any amendment. H.R. Conf. Rep. 95-950, 95th Cong., 2d Sess. 7 (1978); Leg. Hist. 518; see *Trans World Airlines, Inc. v. Thurston*, No. 83-997 (Jan. 8, 1985), slip op. 10-11. Accordingly, the legislative history of this proposed 1978 amendment is instructive with respect to Congress's understanding of the

in establishing that it applies is the responsibility of the employer, employment agency, or labor organization which relies upon it.

This contemporaneous administrative interpretation focusing on the factual nature of the BFOQ defense has been consistently adhered to, and was also adopted by the EEOC. 29 C.F.R. 1625.6; 46 Fed. Reg. 47727 (1981).

BFOQ defense contained in the statute. The Senate explained the defense as follows:

For example, in certain types of particular arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently.

Accordingly, the committee adopted an amendment to make it clear that where these two conditions are satisfied and where such a bona fide occupational qualification has therefore been established, an employer may lawfully require mandatory retirement at that specified age.

S. Rep. 95-493, 95th Cong., 1st Sess. 10-11 (1977); Leg. Hist. 443-444. Thus, even with respect to hazardous occupations like the one involved in this case, Congress contemplated that a BFOQ defense could be established only upon a specific factual showing—along the lines of the *Tamiami* test—that the age limit is necessary. See also H.R. Rep. 95-527, 95th Cir., 1st Sess., Pt. 1, at 12 (1977); 123 Cong. Rec. 34296 (1977) (remarks of Sen. Javits); Leg. Hist. 372, 483. In sum, the decision below flies in the face of the explicit requirements and manifest thrust of the ADEA by finding the existence of a BFOQ for a large class of employees without actual evidence that a mandatory retirement age is necessary for the job.

2. The court of appeals sought to justify this untoward result by relying on a passage in *EEOC v. Wyoming*, *supra*, but the court of appeals' analysis

misunderstands the import of this Court's decision in that case. In *Wyoming*, the Court rejected the state's contention, based on *National League of Cities v. Usery*, 426 U.S. 833 (1976),¹⁵ that the Tenth Amendment was violated by the application of the ADEA to employment practices of state and local governments (in that case, to the job of game warden) because of interference with "traditional governmental functions." The Court explained that the ADEA did not unduly intrude into the exercise of such government functions because it did not require employers to retain unfit employees; it at most required them to make individualized judgments concerning fitness for duty. 460 U.S. at 239. The Court then added that, because of the BFOQ defense, the ADEA did not even necessarily require the state to make such individualized determinations. The Court stated (*id.* at 240 (emphasis in original)) :

Perhaps more important, appellees remain free under the ADEA to continue to do *precisely what they are doing now*, if they can demonstrate that age is a "bona fide occupational qualification" for the job of game warden. * * * Thus, * * * even the State's discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard.

Accordingly, the Court remanded the case, giving the State of Wyoming the opportunity to prove at trial that the age limit was a BFOQ for the job of game warden.

¹⁵ This Court recently overruled *National League of Cities. Garcia v. San Antonio Metropolitan Transit Authority*, No. 82-1913 (Feb. 19, 1985).

The court of appeals below erroneously seized upon the phrase "reasonable federal standard" in this discussion. The court stated that, in light of *Wyoming*, it was required to "initiate a search for a 'reasonable federal standard' by which to test" whether age is a BFOQ for Baltimore firefighters (Pet. App. 6a). The court's search then settled on the federal civil service statute for federal firefighters, 5 U.S.C. 8335 (b), and the court concluded that the "federal standard" established age 55 as a BFOQ for all firefighters.

This analysis completely misconceives this Court's reference in *Wyoming*. The context of the Court's discussion makes it unmistakably clear that the "reasonable federal standard" referred to was that supplied by the ADEA itself—whether the age limit is a BFOQ within the meaning of Section 4(f)(1). Thus, the Court in *Wyoming* was simply acknowledging that the State did have the opportunity to preserve its mandatory retirement age by making a factual showing that the age limit was necessary to the functioning of the state game warden system.¹⁶ *Wyoming* merely confirms the scheme set forth in the text of the ADEA; it provides no avenue for avoiding that scheme.

As explained above, the ADEA is structured to prohibit age discrimination, including mandatory retirement, unless the employer can show that "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. 623(f)(1). The court of appeals' view that in each case the court should search for

¹⁶ In fact, the State of Wyoming ultimately was able to make this showing successfully. On remand, a jury found that age 55 was a BFOQ for game wardens in Wyoming. See Pet. App. 6a n.7; *EEOC v. Wyoming*, No. C 80-0336 B (D. Wyo. Nov. 18, 1983).

some other "reasonable federal standard" to apply to the particular fact situation at hand substitutes chaos for the uniform legal standard established in the ADEA.¹⁷ It is manifest that the Court in *Wyoming* did not intend to create such chaos, and nothing in *Wyoming* in any way supports the court of appeals' decision to exempt respondents from the ADEA's requirement that mandatory retirement be permitted only when the facts demonstrate the necessity for an age limit as a bona fide occupational qualification.

B. The Retirement Provisions Governing Federal Firefighters Do Not Establish Age As A BFOQ For All Firefighters

1. Congress Did Not Intend That The Requirements Of The ADEA Would Be Circumscribed By The Treatment Afforded Federal Employees

a. By its terms, the ADEA prohibits mandatory retirement unless a BFOQ is established. The ADEA contains no language even suggesting that the treatment accorded federal employees is of any relevance

¹⁷ The court of appeals reasoned that "the risk of differing results, case-by-case" (Pet. App. 15a n.22) justified its strained interpretation of the statute. But the possibility of "differing results, case-by-case," if based on different evidence, is precisely what Congress intended. See H.R. Rep. 805, *supra*, at 7; S. Rep. 723, *supra*, at 7; Leg. Hist. 80, 111. The court of appeals overstepped its authority by seeking to promote its own concept of uniformity at the expense of the dictates of the statute. See *Mobil Oil Co. v. Higginbotham*, 436 U.S. 618, 624 (1978); *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 273-274 (1972). Moreover, the court of appeals' approach, involving an ill-defined search for a "reasonable federal standard" in each case, would undermine the uniformity of the statutory standard prescribed by the ADEA and produce differing results not intended by Congress.

in interpreting its requirements. Indeed, the ADEA expressly differentiates federal employees from private and state and local government employees; Section 11(b), 29 U.S.C. 630(b), provides that "employer" under the Act includes "a State or political subdivision of a State * * *, but such term does not include the United States * * *." ¹⁸ Thus, the "plain meaning" of the statute leaves no room for respondents' contention that the ADEA does not prohibit Baltimore's mandatory retirement provision simply because some federal firefighters are subject to retirement at age 55. See, e.g., *Garcia v. United States*, No. 83-6061 (Dec. 10, 1984), slip op. 5; *United States v. Clark*, 454 U.S. 555, 560 (1982). The incompatibility of respondents' contention with the text of the statute is magnified by the fact that Congress did enact in 1978 provisions excepting certain types of employees from some of the ADEA's requirements. See 29 U.S.C. 630(f), 631(c)(1); note 10, *supra*. Thus, if Congress had wished to exempt firefighters or other state employees from the mandatory retirement prohibition on the basis of the treatment accorded similar federal employees, it certainly knew how to do so expressly. See *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 118 (1983); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 784 n.14 (1981).¹⁹

¹⁸ Federal employees are covered by a separate section of the Act. § 15, 29 U.S.C. 633a. See pages 33-34, *infra*.

¹⁹ A bill (S. 2425) was introduced in the last Congress to exempt state law enforcement officers from the ADEA's prescription of mandatory retirement. See 130 Cong. Rec. S2707-S2708 (daily ed. Mar. 14, 1984). The bill was never reported out of committee.

The other guides ordinarily used to construe a statute similarly indicate that retirement statutes for federal employees do not by implication establish age as a BFOQ under the ADEA for similar state employees. Because the BFOQ provision is an exception to a remedial statute and permits the very conduct that the statute generally was designed to prohibit, established principles of construction require that the exception should be read "narrowly" and should be invoked only if an employer proves "plainly and unmistakably" that it is entitled to the benefit of the exception. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Moreover, the court of appeals' interpretation runs contrary to the consistent construction of the statute by the agency charged with its administration; that interpretation is entitled to considerable deference. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Shortly after the ADEA was enacted, the Department of Labor issued guidelines providing that the BFOQ defense "will be determined on the basis of all the pertinent facts surrounding each particular situation." 33 Fed. Reg. 9172 (1968); see note 14, *supra*. Pursuant to these guidelines, the agency administering the ADEA has always taken the position that mandatory retirement ages for police and firefighters violate the Act unless a factual showing of a BFOQ is made. See J.A. 5-6.²⁰

²⁰ The original Department of Labor guidelines on BFOQs issued in 1968 gave as illustrations of possible BFOQs "[f]ederal statutory and regulatory requirements which provide compulsory age limitations for hiring or compulsory retirement * * * when such conditions are clearly imposed for the safety and convenience of the public." 33 Fed. Reg. 9172 (1968); see Br. in Opp. 7-8. The guidelines gave as an exam-

Indeed, the EEOC has studied whether it should establish administratively a permissible mandatory retirement age for police or firefighters (see note 11, *supra*), an effort that plainly reflects as its premise the agency's understanding that the ADEA itself contains no exception derived from the federal firefighters retirement statute.²¹

ple the Federal Aviation Administration's rule prohibiting persons over age 60 from serving as pilots. When the EEOC adopted these guidelines, it removed this reference and all other examples in order "to avoid the appearance that those examples had received the imprimatur of the Commission." 46 Fed. Reg. 47724, 47725 (1981); see *Trans World Airlines, Inc. v. Thurston*, slip op. 10 n.17. Even the original version of the guidelines lends no support to respondents' position that 5 U.S.C. 8335(b) establishes age 55 as a BFOQ for local firefighters, however, because the guidelines refer only to federal requirements applicable to the employees in question; unlike private commercial pilots who are subject to the FAA's Age 60 Rule, the plaintiffs here are not covered by 5 U.S.C. 8335(b). The guidelines adopted by the EEOC and in effect today make clear that age limitations in state and local laws are "effectively superseded by the ADEA * * * [unless] these laws meet the standards for the establishment of a valid [BFOQ]." 29 C.F.R. 1625.6(c).

²¹ The court of appeals stated that its strained statutory interpretation was compelled by the need to avoid "serious constitutional questions" (Pet. App. 9a-14a). As noted by Chief Judge Winter in his dissent (*id.* at 20a n.3) and discussed at greater length in our petition (Pet. 12-13 n.7), this suggestion of constitutional difficulties was seriously mistaken even when made. The constitutional power of Congress under the Commerce Clause to extend the ADEA to state law enforcement officials was upheld in *EEOC v. Wyoming*, *supra*, and nothing in that decision would support a different result for firefighters than for game wardens.

In any event, the contention that this case presents a potential constitutional problem under *National League of Cities*

b. The legislative history of the 1978 amendments to the ADEA removes any conceivable doubt over the effect of federal civil service statutes on the requirements of the Act. The legislative history reveals that the decision to retain mandatory retirement provisions for certain federal employees resulted from an agreement to provide the congressional committees with jurisdiction over the retirement programs at issue the opportunity to review those provisions. In order to expedite the passage of the ADEA, it was agreed to preserve the existing federal mandatory retirement provisions for further study, rather than delaying the ADEA while the appropriate committees considered the specific mandatory retirement provisions within their jurisdiction. See 123 Cong. Rec. 29003-29004 (1977); Leg. Hist. 400-401. The decision to preserve these provisions in 1978 thus clearly did not reflect a congressional finding that mandatory retirement was appropriate for nonfederal employees in similar occupations.

As reported out of committee, the original ADEA bill removed all age limitations on federal employment "notwithstanding any other provisions of federal law relating to mandatory retirement requirements * * *." H.R. 5383, 95th Cong., 1st Sess. 5 (1977); Leg. Hist. 396. During House consideration

v. *Usery*, 426 U.S. 833 (1976), is now foreclosed by the overruling of that decision in *Garcia v. San Antonio Metropolitan Transit Authority*, *supra*. Taken together, *Wyoming* and *Garcia* leave no basis for contending that the ADEA "is destructive of state sovereignty or violative of any constitutional provision." *Garcia*, slip op. 25. Accordingly, the application of the ADEA to this case must be judged on its own terms, not by resort to the spectre of avoiding possible constitutional questions.

of the bill, however, Representative Spellman offered an amendment, on behalf of the House Post Office and Civil Service Committee, to retain the mandatory retirement provisions for certain federal employees, including firefighting personnel. In introducing the amendment, Representative Spellman stated:

I hasten to point out that this amendment does not indicate opposition *per se* [sic] to elimination of mandatory retirement for air traffic controllers, firefighters, and other specific occupations.

However, since most of these mandatory retirement provisions are part of liberalized retirement programs, our committee believes that such provisions should not be repealed until the individual retirement programs have been re-examined.

The amendment will provide the opportunity for review of these retirement programs and their mandatory retirement provisions.

123 Cong. Rec. 30556 (1977); Leg. Hist. 415.

Representative Hawkins, Chairman of the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, stated in agreeing to the amendment (*ibid.*):

By this action we are not reaffirming the mandatory retirement ages in the statutes applicable to these positions. The sole purpose of this agreement is to afford the committees the opportunity to review their statutes.

See also 123 Cong. Rec. 29002 (1977); Leg. Hist. 399. Representative Pepper, another sponsor of the 1978 ADEA amendments, reiterated this point (123 Cong. Rec. 30556 (1977); Leg. Hist. 415):

For the record, * * * I should state what might appear to be obvious: That we in the House, in debating and passing this [Spellman] amendment, are making no judgment whatever on the desirability of retaining the ages now established by the various statutes affected for forced retirement.

See *Vance v. Bradley*, 440 U.S. 93, 97 n.12 (1979).²²

In sum, the retention of federal mandatory retirement provisions for certain employees in 1978 was a result of congressional caution and intended to avoid procedural delays that would be caused by the division of jurisdiction between House committees.²³ The preservation of these civil service statutes plainly did not represent any factual determination by Con-

²² Accordingly, the sections of 5 U.S.C. 8335 relating to mandatory retirement were retained when the 1978 Amendments were enacted. Pub. L. No. 95-256, § 5(c), 92 Stat. 191. There is no direct mention of these retirement provisions, however, in Section 15 of the ADEA, 29 U.S.C. 633a, which extends the Act to federal employees. Several courts have ruled that the specific statutory age restrictions of the existing civil service statutes were not superseded by Section 15 of the ADEA and remain in force. See *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982) (maximum hiring ages permitted by 5 U.S.C. 3307); *Bowman v. United States Dep't of Justice, Federal Prison System*, 510 F. Supp. 1183, 1186 (E.D. Va. 1981) (mandatory retirement for law enforcement officers under 5 U.S.C. 8335(b)); *Bradley v. Kissinger*, 418 F. Supp. 64, 68-69 (D.D.C. 1976), aff'd on other grounds *sub nom. Vance v. Bradley*, *supra* (Foreign Service Act provision for mandatory retirement).

²³ Representative Findley, a cosponsor of the bill, stated that the Spellman amendment was "necessary in order to expedite consideration of this major step forward in eliminating age discrimination." 123 Cong. Rec. 30556 (1977); Leg. Hist. 415.

gress that they met the BFOQ standards of the ADEA or even that their retention was good policy. Indeed, the nature of the original bill reported out of committee and the discussion surrounding its amendment suggests that Congress recognized that the federal mandatory retirement provisions might well be at odds with the ADEA, and it determined to reconsider whether they should be perpetuated. Under no circumstances does their preservation in 1978 reflect a decision by Congress implicitly to curtail the employment protections expressly conferred on nonfederal employees by the ADEA.

c. Indeed, this Court has already repudiated the idea that the federal civil service statutes are relevant to interpreting the ADEA. In *EEOC v. Wyoming*, the State had argued (see No. 81-554, 1982 Term, Appellee's Brief at 13-14, 19), and the district court had found (514 F. Supp. 595, 597 (D. Wyo. 1981)), that the civil service statutes containing mandatory retirement provisions, notably 5 U.S.C. 8335 (b), demonstrated that there was not a sufficient federal interest in the prohibitions of the ADEA to satisfy the constitutional standards for imposing them on state and local governments. The Court rejected that suggestion, explaining (460 U.S. at 243 n.17): "Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in that declaration * * *." In other words, the Court confirmed that the ADEA stands on its own; it is to be examined according to its own terms, not by reference to what Congress has done in other federal statutes. Cf. *United States v. Hopkins*, 427 U.S. 123, 126 (1976) (employees cov-

ered by terms of statute not removed from its effect by reference to other laws dealing with federal employees). As Chief Judge Winter correctly stated in his dissent (Pet. App. 20a), this conclusion completely undermines the linchpin of the decision below, namely, the assertion that the substance of the BFOQ defense contained in the ADEA should be altered by reference to a preexisting statute relating solely to federal employees, 5 U.S.C. 8335(b).²⁴

²⁴ While the litigation in *Wyoming* did not focus on the BFOQ defense, the possibility of a BFOQ defense as a matter of law based on 5 U.S.C. 8335(b) was adverted to in questioning at oral argument in this Court (Tr. of Oral Argument 7-8, 30-32). Under the decision below, the State of Wyoming should have been entitled to a BFOQ defense as a matter of law because of 5 U.S.C. 8335(b). That section applies not only to firefighters, but also to federal law enforcement officers. As the district court in *Wyoming* found (514 F. Supp. at 597), game wardens in Wyoming are considered law enforcement officers authorized to enforce the criminal provisions of Wyoming's fish and game laws. See Wyo. Stat. § 7-2-101 (Supp. 1984); *id.* § 23-6-101 (1977). Similarly, federal game wardens are "law enforcement officers" within the meaning of 5 U.S.C. 8335(b). See 5 U.S.C. 8331(20); Letter from Warren B. Irons, Chief, Retirement Division, U.S. Civil Service Commission to J. Atwood Maulding, Director of Personnel, U.S. Dep't of Interior (Feb. 2, 1949) (appended to the EEOC's petition for rehearing). The Court in *Wyoming* was well aware of the existence of 5 U.S.C. 8335(b) (see 460 U.S. at 243 n.17; *id.* at 263 (Burger, C.J., dissenting)), but it nevertheless remanded the case with the manifest expectation that the State would have to demonstrate at trial that age 55 was a BFOQ for game wardens. See 460 U.S. at 240. Thus, the Court's disposition in *Wyoming* is inconsistent with the court of appeals' conclusion here that age 55 has been established as a *per se* BFOQ for all state employees who can be said to perform the same duties as federal employees covered by 5 U.S.C. 8335(b).

The court of appeals' contrary decision to read 5 U.S.C. 8335(b) into the BFOQ exception in the ADEA rested in part upon its apparent perception that there is something inherently wrong about differences in treatment of federal and local firefighters (see Pet. App. 7a-8a). That view is quite mistaken, however, as the above discussion in *Wyoming* necessarily recognizes. As a minimum, it is clear that Congress may attack a problem—such as age discrimination—in one area without acting in all related areas. See, e.g., *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 466 (1981) (state legislation); *Cleland v. National College of Business*, 435 U.S. 213, 220 (1978); *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966); see also *Mahoney v. Trabucco*, 738 F.2d 35, 41 (1st Cir. 1984). More particularly, the fact that Congress implements a particular policy in the federal sector does not generally mean that it intended to authorize a similar policy in the state sector. See *South-Central Timber Development, Inc. v. Wunnicke*, No. 82-1608 (May 22, 1984), slip op. 10.

With respect to the ADEA, it is manifest that Congress intended to treat federal employees differently from other employees in numerous respects apart from the differences in retirement provisions for firefighters. Federal employees are specifically excluded from the provisions of the ADEA applicable to other employees (§ 11, 29 U.S.C. 630)); instead they are covered by an independent section with its own enforcement mechanisms (§ 15, 29 U.S.C. 633a). This framework establishes significant disparities in treatment between federal and nonfederal employees. For example, although 29 U.S.C. 626(c) (2) generally confers a right to jury trial for ADEA claims, federal employees do not have such a right.

Lehman v. Nakshian, 453 U.S. 156 (1981). In addition, the ADEA excepts from its prohibitions certain high-level executive positions (beyond age 65) (29 U.S.C. 631(c)) and state government policymaking positions (29 U.S.C. 630(f)); there are no comparable exemptions for high-level federal policymakers. Most significantly, the general prohibitions of the ADEA apply only between the ages of 40 to 70, but this 70-year ceiling does not apply to the federal government. See 29 U.S.C. 631(a) and (b). Thus, federal employees in most occupations cannot be forced to retire at any age, while similarly situated private and state and local government employees may be forced to retire at age 70.

Especially against this background of disparate treatment, there is no reason to suppose that Congress would have intended to excuse state and local governments from satisfying the BFOQ standards established by the ADEA simply because an existing statute provided for mandatory retirement for some federal firefighters. Congress determined in enacting the ADEA that the prohibitions against age discrimination generally should be subject only to a narrow, factually-based BFOQ exception; it is unobjectionable for Congress to apply those prohibitions to state and local governments as well as to private employers. See *Garcia v. San Antonio Metropolitan Transit Authority*, No. 82-1913 (Feb. 19, 1985), slip op. 25-26.²⁵

²⁵ Congress, of course, frequently enacts remedial legislation that by its terms is not applicable to federal employees. See, e.g., 26 U.S.C. 3306(c) (6) (unemployment compensation); 29 U.S.C. 152(2) (labor relations). This reflects the fact that Congress can directly supervise the employment relationship with federal workers and treat them uniformly; it therefore

The courts of appeals that have considered the question have generally concluded, in accord with this Court's decision in *Wyoming*, that federal retirement statutes do not establish age as a per se BFOQ for state and local government employees. In *Orzel v. City of Wauwatosa Fire Dep't*, *supra*, the court rejected the precise contention made here—that 5 U.S.C. 8335(b) establishes age 55 as a BFOQ for firefighters. The court explained that Congress's decision that "age 55 is an appropriate retirement age for one group of firefighters does not automatically establish that the same retirement age is a valid BFOQ, under * * * the ADEA, for a wholly different group of employees." 697 F.2d at 749. The court of appeals concluded that the City could establish its BFOQ defense only by means of "objective and credible evidence" at trial. *Id.* at 750. See also *Heiar v. Crawford County*, 746 F.2d at 1197-1200 (following *Orzel* and noting and rejecting the decision below); *Galvin v. Vermont*, 598 F. Supp. 144, 149-150 (D. Vt. 1984) (rejecting the decision below and relying on *Wyoming* to hold that 5 U.S.C. 8335(b) does not establish BFOQ as a matter of law); *EEOC v. Commonwealth of Pennsylvania*, 596 F. Supp. 1333, 1339-1340 (M.D. Pa. 1984), appeal docketed, No. 84-5743 (3d Cir. Nov. 6, 1984) (same); but cf. *EEOC v. Missouri Highway Patrol*, 748 F.2d 447, 455-456 (8th Cir. 1984) (finding that expert testimony at trial established age 60 as a BFOQ under *Tamiami* test but also noting that 5 U.S.C. 8335(b) was "persuasive" evidence).²⁶

need not include them in broad brush legislation that it might otherwise deem required to attack a problem nationwide.

²⁶ Other courts have rejected the contention that age is a per se BFOQ for firefighters, without specifically addressing

In *EEOC v. County of Los Angeles*, 706 F.2d 1039 (9th Cir. 1983), cert. denied, No. 83-332 (Jan. 16, 1984), the county argued that its maximum hiring age of 35 for helicopter pilots and deputy sheriffs was a BFOQ, relying on the maximum hiring age established in 5 U.S.C. 3307(d) for similar federal occupations. The court of appeals ruled against the county, finding that this argument had been considered and rejected in *Wyoming*. 706 F.2d at 1041-1042. In *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982), the court of appeals ruled that the FAA's Age 60 Rule (see note 20, *supra*), which applies only to commercial airline pilots, did not establish that age as a BFOQ for private pilot employees not covered by the regulation.²⁷ See also *Mahoney v. Trabucco*, 738 F.2d at 41; *Stewart v. Smith*, 673 F.2d 485, 492-494 (D.C. Cir. 1982).

2. Congress Has Never Found That Age Is A BFOQ For Firefighters, Even Those Covered By 5 U.S.C. 8335(b)

Quite apart from the fact that Congress did not intend that its treatment of federal employees would govern application of the BFOQ exception in the

the relevance of the federal statute. See *EEOC v. City of St. Paul*, 671 F.2d 1162, 1166-1167 (8th Cir. 1982); *Aaron v. Davis*, 414 F. Supp. 453, 460-463 (E.D. Ark. 1976).

²⁷ In *Gathercole v. Global Associates*, 727 F.2d 1485 (1984), the Ninth Circuit recently upheld the mandatory retirement of a pilot at age 60 by a government contractor that had contracted with the Army to adhere to the FAA's Age 60 Rule for pilots. The court of appeals held that a BFOQ defense was available, not because the FAA rule should be applied to all pilot positions, but because the rule had been made directly applicable by government contract to the pilot position in that case. *Id.* at 1488.

ADEA to state employees, the court of appeals also erred in its underlying premise that Congress had found that age 55 was a BFOQ for federal firefighters. It is quite clear that 5 U.S.C. 8335(b) does not represent a determination by Congress that age 55 is a bona fide occupational qualification for the federal employees covered by that statute. As Chief Judge Winter explained in his dissent (Pet. App. 17a-18a), the federal statute does not unconditionally require retirement at age 55. Firefighters are not subject to mandatory retirement under 5 U.S.C. 8335 (b) unless they have completed 20 years of service and, even in that case, they may be retained at the option of the head of the agency until age 60. The President (whose authority in this regard has been delegated to the Office of Personnel Management, 5 C.F.R. 831.503(c)), may exempt an employee from automatic separation at any age. 5 U.S.C. 8335(d). Thus, the statute clearly contemplates that some firefighters will continue to work past the age of 55. See also *Heiar v. Crawford County*, 746 F.2d at 1199. Unless Congress intended to authorize firefighters whom it believed to be unqualified to continue in their jobs, this scheme is logically inconsistent with a determination by Congress that age 55 is a BFOQ for the job of firefighter. To the contrary, the statute indicates that Congress recognized that firefighters can continue to perform effectively and safely after age 55 and that individualized determinations of fitness are possible.

The history of 5 U.S.C. 8335(b) confirms that its age 55 provision does not represent a congressional determination that that age is a BFOQ for firefighters. Early retirement for selected federal employees began in 1947 with a special program for FBI agents

that allowed retirement at age 50 at an enhanced annuity. Act of July 11, 1947, ch. 219, 61 Stat. 307. The goal of this program was at least twofold: (1) to keep the FBI a "young man's service" partly because of the "many pressures, risks and hazards" that were perceived as making it harder for older agents to carry out their duties; and (2) to "stabilize the Federal Bureau of Investigation into a career service" by providing an incentive for young agents to stay with the FBI rather than seeking other employment. S. Rep. 76, 80th Cong., 1st Sess. 2-4 (1947). In 1948, this program was extended to other federal law enforcement personnel (Act of July 2, 1948, ch. 807, 62 Stat. 1221), and in 1972 it was extended to firefighters (Act of Aug. 14, 1972, Pub. L. No. 92-382, 86 Stat. 539).

In 1974, the statute was amended to provide for mandatory retirement. As with the earlier statutes establishing a voluntary early retirement program, one goal of the amendment was to ensure a "young" workforce that would be "physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service." S. Rep. 93-948, 93d Cong., 2d Sess. 2 (1974). Congress, however, considered little specific evidence and made no factual findings with respect to the ability of older employees to cope with these demands. Thus, to the extent the mandatory retirement provision was intended to reflect a concern about performance of duties, it appears to be an example of the sort of age stereotyping without factual basis that was one of the primary targets of the reforms of the ADEA. See, *e.g.*, S. Rep. 95-493, *supra*, at 3; 112 Cong. Rec. 20821 (1966) (statement of Sen. Javits); Leg. Hist. 52, 436; see generally *EEOC v.*

Wyoming, 460 U.S. at 231.²⁸ It would therefore be entirely antithetical to the purposes of the ADEA for such a federal mandatory retirement statute—not based on factual consideration of age as an occupational qualification—to be held to establish a per se BFOQ exception for state and local government employees (or any other employees) protected by the ADEA.²⁹

Moreover, Congress also advanced other reasons for establishing mandatory retirement in 5 U.S.C. 8335 (b)—reasons that have nothing whatever to do with qualification for employment as a firefighter. Congress found that the voluntary early retirement program was having an adverse effect on the quality of older federal employees because the “more alert and aggressive employees” had been retiring early to “desirable jobs outside the Government” while the less able employees were remaining at their jobs until age 70. H.R. Rep. 93-463, 93d Cong., 1st Sess. 3-4 (1973). In addition, as with the original 1947 legislation, the financial incentives accompanying early re-

²⁸ Moreover, Congress has not acted with complete consistency on the specific subject of retirement ages for firefighters. For many years, the law governing the District of Columbia Fire Department has provided for mandatory retirement at age 60 (in the discretion of the Mayor). See D.C. Code Ann. § 4-618 (1981). In 1970, Congress passed several amendments to this law (Pub. L. No. 91-509, 84 Stat. 1136-1137), but did not amend this mandatory retirement provision.

²⁹ Congress did not refer to the ADEA in the course of its 1974 consideration of the mandatory retirement provisions of 5 U.S.C. 8335(b). The fact that it plainly did not focus on the terms of the ADEA at this time also makes it highly inappropriate to invoke 5 U.S.C. 8335(b) to modify the plain meaning of the ADEA. See *Diamond v. Chakrabarty*, 447 U.S. 303, 314 (1980).

tirement were intended to induce younger employees to remain in federal service, which would reduce turnover and training costs, and to reward employees for having done hazardous work. *Id.* at 4. Another reason given for mandatory retirement was to enable management to "retire, without stigma, one who suffers loss of proficiency." *Retirement for Certain Hazardous Duty Personnel: Hearing on H.R. 6078 and H.R. 9281 Before the Subcomm. on Compensation and Employment Benefits of the Senate Comm. on Post Office and Civil Service*, 93d Cong., 2d Sess. 134 (1974) (testimony of Rep. Brasco, sponsor of House bill). Because these reasons for enacting the retirement provision are not addressed to occupational qualifications, it is apparent that 5 U.S.C. 8335(b) does not represent a congressional finding that age is a BFOQ for federal firefighters, much less firefighters in the City of Baltimore.³⁰

There is unquestionably considerable tension between the policies reflected in the ADEA and the federal mandatory retirement provision of 5 U.S.C.

³⁰ By contrast, in the ADEA Congress determined that such countervailing policies must yield to the need to prevent older workers from being unfairly deprived of employment opportunities. Accordingly, numerous courts have held that economic considerations, such as reducing training costs, cannot be used to justify mandatory retirement under the ADEA on the theory that age is a BFOQ. See, e.g., *EEOC v. City of Altoona*, 723 F.2d 4, 7 (3d Cir. 1983); *Smallwood v. United Air Lines, Inc.*, 661 F.2d at 307. And the legislative history of the 1978 amendments to the ADEA specifically indicates Congress's rejection of the idea that mandatory retirement can be justified by the desire to eliminate the stigma of forced termination for lack of productivity. See Select Comm. on Aging, 95th Cong., 1st Sess., *Mandatory Retirement: The Social and Human Cost of Forced Idleness* 35 (Comm. Print 1977); Leg. Hist. 344.

8335(b). The inconsistency between the reasons given for the latter statute and Congress's approach to the ADEA is a striking example of the "ebbs and flows of political decisionmaking" (*EEOC v. Wyoming*, 460 U.S. at 243 n.17). But it is not proper for the judiciary to undertake to resolve this tension by altering the plain terms of the ADEA. Congress has established the nature of the BFOQ defense in that Act, and 5 U.S.C. 8335(b) provides no basis for finding that the requirements of the defense have been met in this case. It is for Congress, not the courts, to reconcile the policies of the two statutes if it concludes that such action is appropriate.³¹

³¹ After the 1978 amendments were enacted, Representative Spellman's Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service held hearings on the retirement provisions of 5 U.S.C. 8335(b). The committee heard testimony both in favor and opposed to the mandatory retirement provision. The committee also considered a General Accounting Office study, *Report to the House Comm. on Post Office and Civil Service by the Comptroller General of the United States: Special Retirement Policy for Federal Law Enforcement and Firefighter Personnel Needs Reevaluation* (Feb. 24, 1977), which found that "[r]etirement policies that disregard differences in physical abilities and productive capacity are costly and wasteful." *Id.* at 10. The report further noted that medical tests of employees and performance reviews of older employees demonstrated that many older employees subject to early retirement could continue to perform their duties satisfactorily. *Id.* at 10-11. After the hearings were completed, however, the subcommittee took no action to change the mandatory retirement law.

Recently, mandatory retirement ages for law enforcement personnel have been harshly criticized in Congress. A new report, Chairman, House Select Comm. on Aging, 98th Cong., 2d Sess., *The Myths and Realities of Age Limits for Law Enforcement and Firefighting Personnel* (Comm. Print 1984),

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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asserts that "it is impossible to justify mandatory retirement or maximum hiring age policies based on arguments of public safety or job-related performance." *Id.* at iv (emphasis in original). The report concludes that "[m]andatory retirement of competent law enforcement officers is unnecessary and wasteful" and criticizes "[t]he federal government's failure to recognize this problem." *Id.* at 24.

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Nos. 84-518 and 84-710

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

ALEXANDER L. STEVENS,
CLERK

ROBERT W. JOHNSON, et al.
Petitioners

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
et al.

Respondents

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
et al.

Respondents

On Writs of Certiorari
To the United States Court of Appeals
for the Fourth Circuit

BRIEF OF AMICUS CURIAE
STATE OF VERMONT

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I.

INTEREST OF AMICUS CURIAE

As Chief Justice Burger noted in his dissenting opinion in E.E.O.C. v. Wyoming , 460 U.S. 226, 253, (1983) (Burger, Ch.J., dissenting), more than half of the states have retirement laws which may run afoul of the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq . (hereinafter the "ADEA"). The State of Vermont is one such state by virtue of its statute requiring state police officers to retire at age 55. 3 V.S.A. §459 (a)(2).

Currently, Vermont is a defendant in two suits in which individual retired police officers have challenged the validity of the retirement law under the ADEA. Several others have threatened suit, and the United States Equal Employment Opportunity Commission

(E.E.O.C.) has advised that it may file suit at any time.

The State of Vermont feels that its retirement law is valid since age is a "bona fide occupational qualification" (B.F.O.O.) within the meaning of that term in the ADEA. Vermont's age limitation is both a practical and reliable means of assuring that its officers are physically able to perform the often demanding and strenuous duties of police work. However, the costs of defending the current and threatened suits, each of which will involve several medical experts, will prove exceedingly burdensome to a small, rural state such as Vermont.

The State believes that the Court's decision in the present action will have a dramatic effect on whether Vermont and hundreds of other states and municipalities will have to litigate the

BFOQ issue repeatedly in order to protect their ability to staff their police and firefighting forces with persons who are capable of handling severe stress and exertion.

II.

SUMMARY OF ARGUMENT

The Court of Appeals below recognized that Congress had intended to permit discrimination based on age in those limited circumstances in which age could be established as a BFOQ. The Court correctly held that Congress itself had recognized age as a BFOQ for police and firefighters when it required that its own police and firefighters retire at age 55. 5 U.S.C. §8335(b). Adoption by this Court of the Fourth Circuit's rationale would put an end to the current undesirable phenomenon, where the BFOQ issue for law enforcement

officers and firefighters is being needlessly litigated over and over in hundreds of different cases nationwide. Not unexpectedly, the proliferation of litigation has left the states and municipalities with no clear guidance as to the legality of their retirement laws. One court upholds an age-50 retirement for all state police officers; another invalidates an age-65 retirement for fire chiefs only; and a third invalidates an age-65 retirement for all liquor control enforcement officers. Compare Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984) with E.E.O.C. v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982) and E.E.O.C. v. Pennsylvania Liquor Control Board, 565 F.Supp. 520 (E.D.Pa. 1983).

The State of Vermont believes that the Fourth Circuit's analysis is the correct one. However, should this Court

wish to apply some other test, then it should adopt an analysis similar to that used in the equal protection cases. See e.g. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). Such a test would recognize that where the public safety is at stake, the states and municipalities should be accorded a measure of discretion and their retirement laws sustained so long as they can demonstrate a rational basis for their decisions.

III.

ARGUMENT

- A. This Court Should Eliminate Current Inequities in the Interpretation of the ADEA by other lower courts, and Adopt the Rationale of the Court of Appeals Below.

Prior to the Fourth Circuit's decision in the present case, the states and municipalities were faced with an

ADEA with few guidelines on the BFOQ defense. While generally forbidding age discrimination against persons who are between 40 and 70, the ADEA carved out an exception

where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

29 U.S.C. §623(f)(1).

Absent further guidance from Congress on just what this exception meant, many of the federal circuits came to adopt what has since become known as the "Tamiami Test". E.g. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235-6 (5th Cir. 1976); Orzel v. City of Wauwatosa Fire Dept. 697 F.2d 743, 753 (7th Cir. 1983); Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); E.E.O.C. v. County of Allegheny, 705 F.2d 679 (3d Cir.

1983). Under this test an employer must show that the age qualification is "reasonably related to the 'essential operation' of its business, and must demonstrate, either that there is a factual basis for believing that all or substantially all persons above the age limit would be unable to effectively perform the duties of the job or that it is impossible or impracticable to determine job fitness on an individualized basis." Orzel , supra, 697 F.2d at 753 (emphasis original).

Nearly every court that has applied this test has viewed it as imposing a very high standard on the employer. The trial judge in the present case described the Tamiami test as placing a "substantial" burden on the City of Baltimore. Similarly, Chief Justice Burger has described it as a "high standard". E.E.O.C. v. Wyoming ,

supra. In commenting on the burden it placed on the City of Baltimore in this case, the Chief Justice went on to observe:

Given the state of modern medicine, it is virtually impossible to prove that all persons within a class are unable to perform a particular job or that it is impossible to test employees on an individualized basis. See, e.g. Johnson v. Mayor and City Council of Baltimore, 515 F.Supp. 1287, 1299 (D. Md. 1981), cert. denied, 455 U.S. 944.

Id. (emphasis added).

After many years of litigation wherein the Tamiami test was utilized by judges and juries, a confusing patchwork of decisions has emerged which, while giving some hope to the states and municipalities, has left lingering doubts as to whether or not police officers and firefighters can lawfully be retired at any age below 70.

For example, most of the early cases, particularly at the trial level,

seemed to indicate that it was exceedingly difficult, if not impossible, to prove a BFOQ. Johnson v. Mayor and City Council of Baltimore, 515 F.Supp. 1287 (D.Md. 1981) cert. denied, 455 U.S. 944 (1982); E.E.O.C. v. Missouri State Highway Patrol, 555 F.Supp. 97 (W.D. Mo. 1982) (The court struck down an age-60 retirement for the highway patrol and held that a patrolman's functional, not chronological, age was controlling); E.E.O.C. v. Pennsylvania Liquor Control Board, supra (Court invalidated an age-65 retirement for liquor control enforcement officers); E.E.O.C. v. County of Los Angeles, 706 F.2d 1039 (9th Cir. 1983) (County failed to prove BFOQ for a maximum hiring age of 35 for sheriff's and fire departments). However, some of these same cases were later reversed on appeal on factual or legal grounds. E.g. Johnson v. Mayor

and City Council of Baltimore , 731 F.2d 209 (4th Cir. 1984); E.E.O.C. v. Missouri State Highway Patrol , 748 F.2d 447 (8th Cir. 1984); Mahoney v. Trabucco , 738 F.2d 35 (1st Cir. 1984). Later BFOQ defenses began to get a better reception at the trial level. E.E.O.C. v. Commonwealth of Pennsylvania , 596 F.Supp. 1333 (M.D. Pa. 1984) (BFOQ found for age-60 retirement of the state police); E.E.O.C. v. Wyoming , Civil No. C80-0036 (D.Wyo. November, 1983), (Jury found BFOQ after remand from U.S. Supreme Court); E.E.O.C. v. City of St. Paul, supra.

Today, seven years after the ADEA was made applicable to the states and their political subdivisions, the scales have tipped in favor of the BFOQ defense for police and firefighters, but the harshness of the Tamiami test still

leaves lingering doubts as to how a particular judge or jury might view the case. And despite the seven years of precedent, the states must still litigate each and every case on the merits in order to be sustained in a BFOQ defense. Because of the lingering uncertainties, the states and towns are still left wondering if their retirement plans are valid or not, and are faced with the very distinct possibility that an age 55 retirement for police could be held valid in one state but invalid just across the border in another state.

Apparently doubting that Congress could have intended such an absurd result, the Court of Appeals in this case noted that Congress had already established a BFOQ when it required its own federal law enforcement officers and firefighters to retire at age 55. 5 U.S.C. §8335(b). Recognizing that the

federal retirement plan was motivated by a need, identical to Baltimore's, to insure that firefighters were capable of handling sustained physical exertion, the Court of Appeals correctly held that age 55 was also a BFOQ for Baltimore's firefighters.

The State of Vermont respectfully urges this Court to adopt the Fourth Circuit's rationale. Such a ruling would put an end to the uncertainty which has plagued the scores states, cities, and towns, who have searched for a workable resolution to retirement disputes and who have already spent hundreds of thousands of dollars on litigation in a vain effort to obtain a definitive answer. The Fourth Circuit's analysis removes the danger that a retirement age could be upheld in one jurisdiction, while being struck down in another. But most importantly, it would

recognize for all governmental bodies what Congress has already affirmed on the federal level--that in matters pertaining to police and firefighters the public safety demands that age be deemed a BFOQ.

B. If the Court Believes that the ADEA Requires a BFOQ Determination on a Case-by-Case Basis, then it Should Reject the Lopsided Tamiami Test and Adopt a Rational Basis Analysis.

Unlike many other circuits which have addressed the issue, the Fourth Circuit did not examine the specific facts bearing on the BFOQ defense. Therefore, should this Court reject the Fourth Circuit's legal analysis, an issue remains as to whether the trial court correctly applied the facts to the law.

As has already been noted, the trial judge applied the Tamiami test in a manner which made it exceedingly dif-

ficult, if not "impossible" for Baltimore to succeed in its BFOQ defense. The State of Vermont believes that since the Tamiami test imposes a burden far more severe than Congress intended, that test should now be rejected and a different test, consistent with the ADEA, be imposed.

In Usery v. Tamiami Trail Tours, Inc. , supra , the Fifth Circuit disclosed that it had derived its now landmark test not from the ADEA itself, but rather from two sex discrimination cases. The first prong of the test (whether the age qualification reasonably relates to the essential operation of the business) arose from Diaz v. Pan American World Airways , 442 F.2d 385 (5th Cir. 1971). In Diaz the Court rejected Pan Am's policy of refusing to hire male cabin attendants, because they were supposedly not as well equipped to

deal with the psychological needs of passengers as were females. The Court reasoned that discrimination based on sex could be justified only where the essence of the business would be undermined by the failure to hire members of one sex exclusively. Since the essence of Pan Am's business was safety, and not the psychological needs of passengers, the court refused to sanction the discriminatory hiring policy.

The second prong of the Tamiami test (a factual basis that all or substantially all persons above the age limit would be unable effectively to perform the job, or that it would be impossible or impracticable to determine fitness on an individualized basis) was derived from Weeks v. Southern Bell Telephone & Telegraph Co. , 408 F.2d 228 (5th Cir. 1969). In Weeks the company had refused to hire women for a

job which occasionally required the lifting of objects weighing 30 lbs. or more. The court ruled that in order to sustain a Title VII BFOQ defense in this instance, the employer would have to prove that he had a factual basis for concluding that all, or substantially all, women could not perform safely and efficiently the duties of the job involved. Id. at 235. The remainder of the second prong of the Tamiami test was contained in a footnote in Weeks. Id. at 255, n.5.

While these standards may have been appropriate in those sex discrimination cases, there is no basis for automatically applying them to age discrimination cases under the ADEA. One critical distinction between these two types of discrimination is that classifications based on sex have enjoyed considerably more protection from the courts than age

classifications have ever received. This Court has recognized that women have suffered a "... long and unfortunate history of sex discrimination," and that they still face "... pervasive ... discrimination in our educational systems, in the job market, and ... in the political arena." Frontiero v. Richardson , 411 U.S. 677, 684, 686. (1973). Women, therefore, fall just short of a "suspect" class. By contrast, this Court easily rejected "suspect" class status for the aged, and more specifically the class of all Massachusetts highway patrolmen over age 50, when it stated:

[A] suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons ... have not experienced a 'history of purposeful unequal

treatment ' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities ... [O]ld age does not define a 'discrete and insular' group, [cite omitted] in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span.

Massachusetts Board of Retirement v. Murgia , 427 U.S. 307, 313, 314 (1976)(emphasis added).

The Tamiami court therefore extrapolated an oppressively strict two-prong standard from the highly protected area of sex discrimination and summarily superimposed that standard on an age discrimination case without any statutory or judicial authority for doing so.

An examination of the language of the ADEA itself reveals the overreaching of the Tamiami court. The ADEA sets forth in plain language an uncomplicated test. An age qualification is valid :

where age is a bona fide occupational qualification reasonably

necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

29 U.S.C. §623(f)(1)(emphasis added).

The ADEA makes no mention of "essential" operations. It mentions only "normal" operations. It gives not the slightest hint that a factual basis must exist which proves that "all or substantially all" persons above the specified age must be unable to perform the duties of the job. Instead, it sets forth in plain English the rather mundane requirement that the age classification must only be "reasonably necessary" to the normal operation of the business. Nor is there any hint in the ADEA that an employer must show that it would be "impossible or impracticable" to determine fitness on an individualized basis. Simply stated, the ADEA's BFOQ exception requires the

employer to act reasonably and responsibly, nothing more and nothing less.

In discussing the degree of intrusion offered by the ADEA into traditional state functions, this Court has already indicated that the " ... States' discretion ... [is] merely being tested against a reasonable federal standard." E.E.O.C. v. Wyoming, supra , 460 U.S. at 240. Again, the ADEA itself suggests only a standard of reasonableness, not a "virtually impossible" test as Tamiami has been described by the Chief Justice. E.E.O.C. v. Wyoming , supra , (Burger, Ch.J., dissenting).

Should this Court find it necessary to review the facts of this case against a BFOQ standard, the State of Vermont respectfully requests that the unduly burdensome Tamiami test be rejected, and that the Court apply the plain and

unadorned language of §623(f)(1). Since the language of this section suggests nothing more than a test of reasonableness, the BFOQ defense could be evaluated in much the same manner as this court applied the "rational basis" test in Massachusetts Board of Retirement v. Murgia, supra. If it was objectively reasonable for the City of Baltimore to have concluded that an age-55 retirement was necessary to assure that its firefighters were physically capable of enduring the rigors of firefighting, then Baltimore's retirement law should be upheld. As in Murgia, it would matter not that the age-55 classification was less than perfect, or that some other age could also have been chosen. It would suffice that Baltimore had been able to demonstrate that it had acted reasonably and responsibly in imposing the retirement age.

An application of a rational basis test, at least in the case of police and firefighters, would also have the effect of reconciling the Age Act with Congress' decision to retire federal police and firefighters at age-55. It would enable states and municipalities to make the same judgments as did Congress, that, when public safety is at stake, it is permissible to impose reasonable restrictions on the maximum ages of law enforcement officers and firefighters.

CONCLUSION

The rationale of the Court of Appeals should either be affirmed in its entirety, or this Honorable Court should apply a BFOQ test based upon reasonableness, which would accord to the states and municipalities a substantial measure of discretion in determining what is reasonably necessary to insure the public safety.

Respectfully submitted,

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ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

ROBERT W. JOHNSON, *et al.*,

Petitioners,

v.

MAYOR and CITY COUNCIL OF BALTIMORE, *et al.*,

Respondents.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

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ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**AMICUS CURIAE BRIEF OF THE ATTORNEY
GENERAL OF THE STATE OF NEW YORK**

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IN THE
Supreme Court of the United States

October Term, 1984

No. 84-518, No. 84-710

ROBERT W. JOHNSON, *et al.*,

Petitioners,

v.

MAYOR and CITY COUNCIL OF BALTIMORE, *et al.*,

Respondents.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

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ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**AMICUS CURIAE BRIEF OF THE ATTORNEY
GENERAL OF THE STATE OF NEW YORK**

Interest of Amicus

The State of New York, by its Attorney General, Robert Abrams, submits this brief as *amicus curiae* pursuant to Supreme Court Rule 36.4.

The State of New York has enacted legislation which establishes age as a factor in the employment of state and local law enforcement officers. Under the New York Civil Service Law, one must, with certain exceptions, be under the age of 30 to be eligible for appointment as a state or local police officer. Civil Service Law, § 58 (subd. 1, par.[a]). Under the New York Retirement and Social Security Law, a mandatory retirement age of 55 has been set for state police officers. Retirement and Social Security Law, § 381-b (subd. e). These statutes are presently under separate challenge in federal court. *Hahn v. City of Buffalo*, 596 F. Supp. (W.D.N.Y. 1984), *app. pending* (challenge to Civil Service Law); *EEOC v. State of New York*, No. 84-CV-12 (N.D.N.Y.) (challenge to Retirement and Social Security Law).

In *Hahn*, the district court invalidated section 58(1)(a) of the Civil Service Law, finding, after a lengthy trial, that the statute conflicts with the Federal Age Discrimination in Employment Act (29 U.S.C. § 621 et seq.). In *EEOC v. State of New York*, the Attorney General's motion for summary judgment based on the same legal issues as are raised here was denied. Thus, the Court's decision in this case will have a significant impact on the employment of law enforcement officers in New York State.

Summary of Argument

The determination of whether age is a BFOQ reasonably necessary for law enforcement and firefighting does not require case-by-case litigation. For these occupations, Congress has established age 55 as a statutory standard on which state and local governments may rely. 5 U.S.C. § 8335(b).

The age limit established under 5 U.S.C. § 8335(b) is easily harmonized with congressional concern, under the ADEA, about age discrimination in employment. Under the ADEA, age may be considered only insofar as it is a reasonably necessary BFOQ. Under 5 U.S.C. § 8335(b), Congress has established that age *is* a BFOQ for police and firefighters. Thus, a federal standard has been established on which state and local governments may rely in their attempts to comply with the ADEA.

The failure of some courts to apply this statutory BFOQ has resulted in the unnecessary invalidation of state and local laws compelling police and firefighters to retire at the age of 55. These courts have mistakenly presumed that there is an irreconcilable conflict between these state and local laws and the Federal Age Discrimination in Employment Act. 29 U.S.C. § 621 et seq. However, simply recognizing that 5 U.S.C. § 8335(b) provides a reasonable federal standard upon which to establish a BFOQ for state or local police or firefighters would have obviated the need to find statutory conflict in these cases. By doing so, the strong policy against invalidating state or local laws, where conflict with federal law is avoidable, is advanced. The Fourth Circuit adopted such a common-sense approach.

Moreover, allowing reliance on 5 U.S.C. § 8335(b) to establish retirement ages for state or local police and firefighters is compatible with the purposes and objectives of Congress. Congress has expressed concern that litigation not be the sole means of establishing a BFOQ, and has recommended that generic standards or guidelines be used. Under 5 U.S.C. § 8335(b), Congress itself has established such a guideline. The legislative history of this statute is replete with congressional statements about the need for relatively young law enforcement officers and firefighters. No distinction was drawn between federal and nonfederal employees in these occupations. Clearly, Congress has con-

cluded that a mandatory retirement age limit of 55 is reasonably necessary to law enforcement and firefighting operations.

ARGUMENT

The Mandatory Retirement Age of 55 Established by Congress for Federal Law Enforcement Officers and Firefighters Should, as a Matter of Law, Be Deemed a Bona Fide Occupational Qualification for State and Local Law Enforcement Officers and Firefighters.

In 1967, Congress passed the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. The ADEA prohibited employers from discriminating against persons 40 to 65 years old because of age.* The Act specifically made it unlawful for an employer to discharge a worker on such a basis. 29 U.S.C. § 623(a). However, Congress recognized that some employment practices based on age may be justifiable. Accordingly, it provided that age as an employment criterion is unlawful "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . . ." 29 U.S.C. § 623(f)(1).

As originally passed in 1967, the ADEA did not apply to the United States Government, the states or their political subdivisions. However, in 1974, Congress extended the Act to cover these governmental bodies.** Federal work-

* In 1978, the general protection of the ADEA was raised to age 70. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978).

** Under § 11(b) of the ADEA, the definition of "employer" was expanded to include "a State or a political subdivision of a State and

(footnote continued on following page)

ers were covered under section 15 of the Act. 29 U.S.C. § 633a. Although Congress created an independent enforcement mechanism for federal employment, the same restrictions and standards applied to federal, state and local employers: age discrimination was prohibited unless it could be shown that age is a BFOQ necessary to the performance of the duties of the position. 29 U.S.C. §§ 623 (f)(1), 633a.

Significantly, in the same year in which Congress extended the ADEA to government employers, it also established a mandatory retirement age for two federal occupations. Pub. L. No. 93-350, 88 Stat. 356 (1974), 5 U.S.C. § 8335(b). Under this statute, a law enforcement officer* or firefighter must retire on the last day of the month in which he or she becomes 55 years old or completes 20 years of service, whichever comes later.

Like Congress, the City of Baltimore has established a mandatory retirement age of 55 for its firefighters. However, on this appeal, petitioners argue that this local law conflicts with the ADEA and must, therefore, be invalidated. They contend that the validity of state and local laws setting mandatory retirement ages for police and fire-

(footnote continued from preceding page)

any agency or instrumentality of a State or political subdivision of a State. . . ." 29 U.S.C. § 630(b). In *EEOC v. Wyoming*, 460 U.S. 226 (1983), this Court found that the extension of the ADEA to state and local governments did not violate the doctrine of Tenth Amendment immunity articulated in *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, — U.S. —, 53 U.S.L.W. 4135 (February 19, 1985).

* 5 U.S.C. § 8331(20) defines law enforcement officer as "an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States."

fighters may not be based on the federal age limit established by Congress under 5 U.S.C. § 8335(b). The State of New York disagrees.

The standards for determining whether state and local laws are invalid under the Supremacy Clause, because of a conflict with a federal statute, are well established. First, courts indulge a rule of construction which avoids finding a conflict, if at all possible. *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). This Court has a strong policy against invalidating state and local laws in the absence of a clear showing of irreconcilable conflict. *Seagram & Sons, Inc. v. Hostetler*, 384 U.S. 35, 45 (1966); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960). Second, a conflict will be found only where the state or local law stands “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . .” *Hines v. Davidowitz*, 312 U.S. 399, 404 (1941). See also, *Lime and Avocado Growers v. Paul*, 373 U.S. 132 (1963). Third, when interpreting a legislative scheme, this Court looks to the whole of the statute or statutes on the same subject to find “‘such a construction as will carry into execution the will of the legislature’”. *Kokoszka v. Bedford*, 417 U.S. 642, 650 (1974), quoting *Brown v. Duchesne*, 19 How. 183, 194 (1857). These standards require that the federal statutory scheme which explicitly authorizes a mandatory retirement age limit for federal police and firefighters be regarded as likewise authorizing, rather than displacing, state and local laws directing precisely the same result.

A. Allowing Reliance on the Mandatory Retirement Age of 55 Under 5 U.S.C. § 8335(b) to Establish Retirement Ages for State and Local Police and Firefighters Avoids an Unnecessary Conflict Between Federal Law and State and Local Laws.

Prior to 1974, when the ADEA did not apply to state and local governments, government employers were afforded a "relatively relaxed standard" in establishing mandatory retirement age limits, and the validity of these limits was consistently upheld. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (rational relationship standard applied in upholding the constitutionality of a state statute requiring that state police officers retire at age 55); *Vance v. Bradley*, 440 U.S. 93 (1979) (mandatory retirement age of 60 for participants in Foreign Service Retirement System upheld.)

However, since the 1974 extension of the ADEA, a host of lawsuits have challenged the mandatory retirement age limits established by state and local governments. Most of these lawsuits have involved law enforcement officers and firefighters.* Indeed, in his concurring opinion in *EEOC v. Wyoming*, 103 S. Ct. at 1069-1070 n. 2, Justice Stevens noted that more than half the states have mandatory retire-

* See, for example, *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984); *Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir. 1984), *petition for cert. denied*, — U.S. —, 53 U.S.L.W. 403 (1984) (State police officers); *EEOC v. City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982) (firefighters); *Heiar v. Crawford County, Wisc.*, 746 F.2d 1190 (7th Cir. 1984) (police officers); *Orzel v. City of Wauwatosa*, 697 F.2d 743 (7th Cir. 1983), *cert. denied*, — U.S. —, 104 S. Ct. 484 (1984) (firefighters); *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977) (city police officers); *EEOC v. Commonwealth of Pennsylvania*, 596 F. Supp. 1333 (M.D. Pa. 1984) (State highway patrolmen). New York State's mandatory retirement age limit of 55 for state police officers (Retirement and Social Security Law, § 381-b [subd. e], L. 1969 c. 3365, amended L. 1982, c. 862 § 1) is presently under challenge in federal court, as well. *EEOC v. State of New York*, No. 84-CV-12 (N.D.N.Y.).

ment laws for police or firefighters which violate the ADEA unless they reflect a BFOQ.

In each of these cases challenging the mandatory retirement age limit for law enforcement officers or firefighters, the State or its political subdivision has been required to establish *at trial* that age is a BFOQ. Since 1976, practically all of these cases have adopted the same BFOQ standard first set forth in an ADEA challenge brought against a *private* employer. *Usery v. Tamiami Trail Tours Inc.*, 531 F.2d 224, 236 (5th Cir. 1976). This strict standard requires that job qualifications on the basis of age be "reasonably necessary to the essence of [the] business" and that either "all or substantially all" members of a class "would be unable to perform safely and efficiently the duties of the job involved" or "that it is impossible or highly impractical to deal with" members of a class "on an individualized basis". *Harris v. Pan American Airways*, 649 F.2d 670, 676 (9th Cir. 1981), citing *Tamiami*, 531 F.2d at 236.

In applying the *Tamiami* standard, a number of courts, including the district court below, have found that age is not a BFOQ for law enforcement officers and firefighters. *Heiar v. Crawford County, Wisc.* 746 F.2d 1190 (7th Cir. 1984); *Orzel v. City of Wauwatosa*, 697 F.2d 743 (7th Cir. 1983); *EEOC v. City of St. Paul*, 671 F.2d 1162 (8th Cir. 1982). Accordingly, these courts ruled that the state or local law in question conflicts with the ADEA and is thus invalid.

These findings, seemingly compelled by the *Tamiami* standard, create a conflict whereby local and state laws are displaced because they are held to violate one part of a federal statutory scheme another part of which authorizes the federal government to do precisely what is forbidden to the states and municipalities. Such statutory conflict

could have been avoided had the courts not taken so limited a view. Simply recognizing that 5 U.S.C. § 8335(b) provides a reasonable federal standard upon which to establish a BFOQ for state and local police and firefighters would have obviated the need to find statutory conflict in these cases.

In the decision below, the Fourth Circuit adopted a common-sense approach. It refused to accept the notion that Congress would establish a mandatory retirement age limit for federal law enforcement officers and firefighters while, at the same time, placing state and local governments at risk that these same age limits might be found unlawful under federal law for identical occupations. Reluctant to make a determination that Congress adopted an occupational qualification that is not *bona fide* (731 F.2d at 213), the Fourth Circuit held that the federal age limit of 55 for police and firefighters is a reasonable standard applicable as a BFOQ to nonfederal police and firefighters. To do otherwise would have been to create judicially an unnecessary and irreconcilable conflict between federal and local law.

B. The Mandatory Retirement of State and Local Law Enforcement Officers and Firefighters at Age 55 Is Compatible With the Purposes and Objectives of Congress Under the ADEA and 5 U.S.C. § 8335(b).

1. Congress Has Recognized That It Is Reasonably Necessary to Consider Age As a Factor In Establishing Employment Policies for Law Enforcement Officers and Firefighters.

The legislative history of 5 U.S.C. § 8335(b) clearly shows that the same Congress which, in 1974, extended the ADEA to state and local governments had, nevertheless, concluded that age is a factor which may be considered in the employment of law enforcement officers and fire-

fighters. In establishing 55 as the basic age at which these employees are required to retire, Congress found that "these occupations should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service. *They are occupations calling for the strength and stamina of the young rather than the middle aged.*" * (emphasis added). S. Rep. No. 93-948, 93d Cong. 2d Sess. (1974), 1974 U.S. Code Cong & Ad. News 3699. This finding was echoed on the floor of the House of Representatives. In support of the bill, Representative Dulski stated that law enforcement officers and firefighters "are different because we have asked them to do a difficult and dangerous job . . . all of us will benefit by a younger, more active and more vigilant law enforcement and firefighting work force." 119 Cong. Rec. 30592 (1974). See also the comments of Representative Rangel (" . . . it takes young men to do the good job we require of them."), 119 Cong. Rec. 30594 (1974).

Petitioner Johnson suggests that this congressional language refers only to voluntary, not mandatory retirement (Pet. Br. p. 22). This suggestion is entirely mistaken. Prior to 1974, Congress had enacted legislation which provided incentives for federal police and firefighters to retire voluntarily at age 50. Pub. L. No. 80-879, 62 Stat. 122 (1948); Pub. L. No. 92-382, 86 Stat. 539 (1972). This approach

* The legislative history of 5 U.S.C. § 8335(a) shows that Congress had previously reached the same conclusion with respect to air traffic controllers: "Although there are some exceptions to the general rule, most controllers are not able to control traffic in busy facilities at any age near 55—the physical and emotional strength required to do the job, to work odd and continuously changing work shifts, and to insure air safety for the traveling public is simply too much for any man in that age bracket." S. Rep. No. 92-774, 92d Cong. 2d Sess. (1972), 1972 U.S. Code Cong. & Ad. News 2289.

proved unsuccessful. Many employees remained on the job until age 70. H.R. Rep. No. 93-463, 93d Cong. 1st Sess. 3-4 (1973). Thus, a mandatory retirement age was established to rectify this situation and ensure that only relatively young people would serve in these occupations. The statutory language is clear, as is the legislative history.* In enacting 5 U.S.C. § 8335(b), Congress concluded, in 1974, that a mandatory retirement age limit is reasonably necessary to law enforcement and firefighting operations.**

Four years later, Congress again considered this issue in enacting the 1978 amendments to the ADEA. In its Report to Congress on the ADEA, the House Committee on Education and Labor reiterated the findings upon which 5 U.S.C. § 8335(b) had been based:

While it is the primary purpose of this legislation to limit mandatory retirement and other employment discrimination for non-federal employees aged 40-69, . . . it is not intended that the bill prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification reasonably necessary to normal operation of a particular activity. . . . *It is recognized that certain mental and physical capacities may decline with age,*

* The Senate report accompanying the bill recognized that it "provides for the mandatory retirement of law enforcement officers at age 55 . . ." 1974 U.S. Code Cong. & Ad. News 3699. Similarly, during consideration of the bill, Representative Leggett explained that "this bill would fix mandatory retirement at age 55 in most cases". 119 Cong. Rec. 30597 (1974). These statements also show that Congress had established age 55 as a focal point of its legislation. The EEOC's contrary argument is without merit. (EEOC Br., pp. 27-28).

** Indeed, in the Code of Federal Regulations it is clear that Congress has established age as a BFOQ for police officers and firefighters. The code implicitly refers to the statute as an illustration of a BFOQ. 29 C.F.R. § 860.102 (1981).

and in some jobs with unusually high demands, age may be considered a factor in hiring and retaining workers. For example, jobs such as some of those in air traffic control and in law enforcement and firefighting have very strict physical requirements on which the public safety depends. (emphasis added)

H.R. Rep. No. 95-527, 95th Cong. 1st Sess. 12 (1977).

Moreover, in passing these 1978 amendments, Congress specifically considered and rejected a proposal to repeal 5 U.S.C. § 8335(b). In a letter setting forth the position of the House Post Office and Civil Service Committee, its chairman stated that age requirements "are necessary and can be justified by the particular occupations involved and, therefore, we are opposed to any attempt to repeal the authority for such age requirements." 123 Cong. Rec. 29003-29004 (1977).

It matters little that some members of Congress voted against repealing the statute not because they supported mandatory retirement but only because they believed that the retirement programs for police and firefighters should be reviewed more fully at a later time. 123 Cong. Rec. 30556 (1977). First, this sentiment hardly negates the fact that, in 1974, Congress clearly enacted 5 U.S.C. § 8335(b) to ensure that law enforcement officers and firefighters be relatively young. "It is the intent of the Congress that enacted [the section] that controls." *Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977). Second, as shown by the letter above, the extent to which members of the House shared this belief is subject to dispute. Third, eight years have elapsed and the statute is still in effect. By implication, Congress continues to recognize that it is reasonably necessary to establish a mandatory retirement age for law enforcement officers and firefighters.

Finally, in support of its argument that Congress intended to distinguish between federal police and firefighters and their state and local counterparts, the EEOC notes that various sections of the ADEA provide different treatment for federal and nonfederal employees (EEOC Br., pp. 24-25). It is certainly true that some distinction is found. 29 U.S.C. §§ 626(c)(2), 630, 633a. However, to compel an employee to retire on the basis of age, both federal and nonfederal employers must establish that age is a BFOQ. Moreover, all of the ADEA distinctions between federal and nonfederal employment place a heavier burden on the federal government. Thus, for example, the ADEA covers nonfederal employees up to the age of 70, but provides no such ceiling for federal employees. 29 U.S.C. § 631(a)(b). It is one thing for Congress in a given area to require *more* of the federal government than of the states or their subdivisions.* It is quite another for Congress inexplicably to place a heavier burden on the states, with no discernible rationale for so doing. As the Fourth Circuit stated in its decision below, "A court should not lightly make such a determination as to Congressional purpose." 731 F.2d at 213.

2. *Congress Has Found That a BFOQ May Be Established by Means Other Than Case-by-Case Litigation.*

In its Report to Congress on the ADEA amendments of 1978, the Senate Human Resources Committee recognized that a BFOQ will usually be established on a case-by-case basis, but also expressed its concern "that litigation should not be the sole means of determining the validity of a bona fide occupational qualification." S. Rep. No. 95-493, 95th

* We note, however, that New York law prohibits employment discrimination on the basis of age for all persons eighteen years or older, with no ceiling. New York Executive Law, § 296 (subd. 3-a).

Cong. 2d Sess. (1978), 1978 U.S. Code Cong. & Ad. News 514. The Committee recommended that guidelines be established for certain occupations.

It is, therefore, altogether reasonable for state and local governments to rely on an existing "guideline" established by Congress itself for law enforcement officers and firefighters. This reliance is enforced by congressional recognition of the need to ensure that relatively young persons occupy these positions.

Furthermore, nowhere in the legislative history of the ADEA or of 5 U.S.C. § 8335(b) did Congress distinguish between the demands placed on federal police or firefighters and on their state or local counterparts.* Although 5 U.S.C. § 8335(b) is limited by its terms to federal employees, the congressional findings giving rise to the statute are applicable, as well, to state and local employees.** No party here has suggested that fighting fires for the federal government is more arduous than doing so for Baltimore or New York City. Thus, the statute is a "reasonable federal standard" upon which state and local governments may rely in establishing a BFOQ. *EEOC v. Wyoming*, 460 U.S. 226, 240 (1983).

* In fact, it appears that federal firefighting may be as much as thirteen times safer than state or local firefighting. See, *Special Retirement Policies as Related to Mandatory Retirement for Law Enforcement Officers, Firefighters and Air Traffic Controllers*, Subcom. on Compensation and Employee Benefits of the Sen. Comm. on Post Office and Civil Service, 95th Cong. 2d Sess. 13 (October 5, 1978).

** As noted, earlier, New York State has enacted legislation establishing a mandatory retirement age of 55 for state police officers. Retirement and Social Security Law § 381-b (subd. e). The legislative history of this statute reveals language remarkably similar to that found in the history of 5 U.S.C. § 8335(b): "A low mandatory retirement age is necessary for most members of the State Police. The strenuous and often hazardous physical demands of the job require young and vigorous men to fill the positions." (1969 New York Legislative Annual 56).

In its brief, the EEOC claims that the application of a standard which does not require a case-by-case determination will result in chaos (p. 17). On the contrary, the application of the *Tamiami* standard to police officers and firefighters continues to create doubt, confusion and inconsistency as to possible conflicts with federal law. After lengthy trials involving extensive expert testimony, some courts have found that age is not a BFOQ for law enforcement officers and firefighters. *Heiar v. Crawford County, Wisc.*, 746 F.2d at 1190; *Orzel v. City of Wauwatosa*, 697 F.2d at 743; *EEOC v. City of St. Paul*, 671 F.2d at 1162. Other courts have found that a BFOQ for age does exist. *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984); *Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir. 1984), *cert. denied*, — U.S. —, 53 U.S.L.W. 403 (1984); *EEOC v Commonwealth of Pennsylvania*, 596 F. Supp. 1333 (M.D. Pa. 1984).

Moreover, courts reviewing identical evidence have reached different conclusions. In *Missouri State Highway Patrol*, the Eighth Circuit reversed the district court's conclusion that no BFOQ had been established, finding that the district court had erroneously ignored the testimony of a cardiologist and a physiologist. It was, however, the testimony of these same two experts regarding the testing of coronary health which the district court in *Trabucco* relied on in finding a BFOQ and which the district court discounted in this case. See 515 F. Supp. 1287, 1299-1300. Indeed, the Fourth Circuit noted this inconsistency in rejecting such an adjudicative, case-by-case approach where Congress had clearly set out to establish generic standards. See 731 F.2d at 215 n. 20.

C. Read in *Pari Materia*, the ADEA and 5 U.S.C. § 8335(b) Establish a Statutory Scheme Under Which Age 55 Is a BFOQ for Law Enforcement Officers and Firefighters.

Where two or more statutes deal with the same subject, they are of course to be read *in pari materia*. *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). This rule applies with even greater strength when the two statutes at issue are enacted by the same legislative body at the same time. *Id.* at 244. In the same year Congress extended the ADEA to the federal, state and local governments, it expressly found and directed that law enforcement and firefighting are occupations that need to be staffed by relatively young persons.

The two recent statutes are easily harmonized. The ADEA permits consideration of age only insofar as it is a BFOQ reasonably necessary for the task that is to be performed. Under 5 U.S.C. § 8335(b), Congress has established that age is a reasonably necessary BFOQ for police and firefighters. By doing so, Congress established a federal standard to which state and local governments could at least refer in their attempts to comply with the ADEA. Such a construction avoids statutory conflict and advances congressional objectives.*

* Despite petitioner's contrary assertion (*Johnson Br.*, p. 17), the Court has not previously addressed this issue. *EEOC v. Wyoming*, 460 U.S. at 226, concerned only whether extending the ADEA to the states was in violation of Tenth Amendment protections. This Court was not asked to decide whether 5 U.S.C. § 8335(b) establishes a BFOQ for state or local law enforcement officers. Wyoming's brief (pp. 12-14) reveals only a request that it be allowed to establish a mandatory retirement age limit as Congress did in enacting § 8335(b). To be sure, in his dissent Chief Justice Burger assumed that 5 U.S.C. § 8335(b) is an exception to the ADEA limited to federal employees. This assumption, however, was made without the benefit of any significant discussion. No contrary position was argued.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Dated: New York, New York
March 29, 1985

Respectfully submitted,

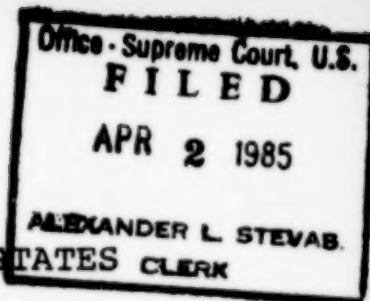
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(9) (9)
Nos. 84-518 and 84-710

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v.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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BRIEF OF AMICI CURIAE
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COMMONWEALTH OF KENTUCKY,
COMMONWEALTH OF PENNSYLVANIA, STATE
OF INDIANA, STATE OF LOUISIANA,
STATE OF MISSISSIPPI, STATE OF
MISSOURI, STATE OF NEW JERSEY,
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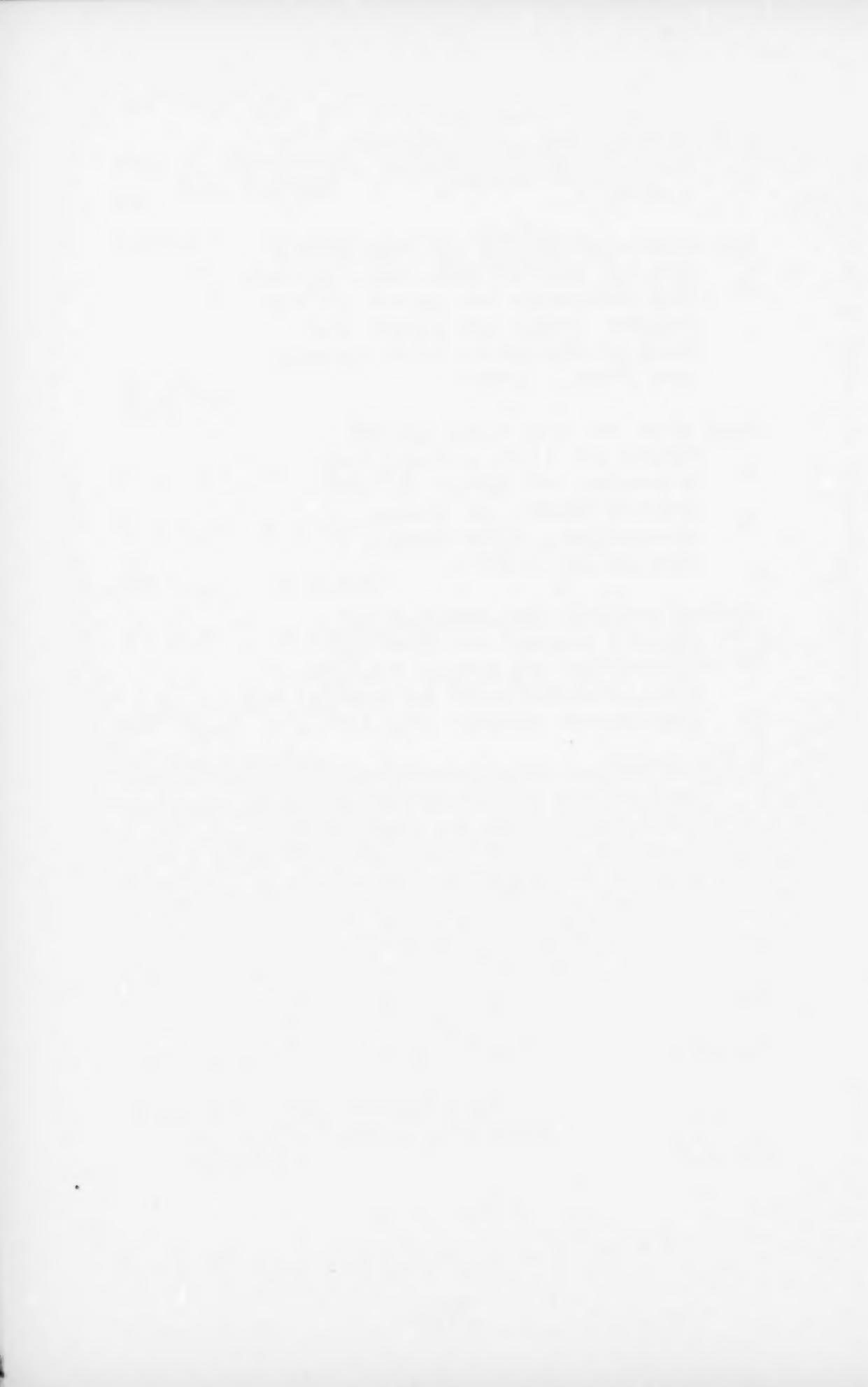
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STATE OF OHIO, STATE OF TENNESSEE

INTEREST OF THE AMICI CURIAE

The States identified above submit
this brief amici curiae to address the
standards governing the establishment of

a bona fide occupational qualification ("BFOQ") in a public safety context under the Age Discrimination in Employment Act ("ADEA").

As States, the amici are responsible for the protection of the public safety through the establishment of law enforcement and firefighting forces at state and local levels. To promote the effective performance of the strenuous and hazardous duties required for such positions, each of the amici has enacted legislation mandating the retirement of public safety personnel earlier than age seventy. This Court's articulation of the standards governing the recognition of a BFOQ in a public safety context will have a significant practical impact upon the defense of such statutes.

SUMMARY OF ARGUMENT

The BFOQ exception is an integral part of the ADEA, and it is entitled to be given full effect in accordance with its language and underlying congressional intent. While the ADEA unquestionably is directed to eliminating arbitrary age discrimination, the BFOQ exception recognizes that there are certain contexts in which age legitimately can be relied upon as an important indicator of ability. (Pp. 6-17.)

In a limited number of hazardous and arduous occupations such as firefighting and law enforcement, there is a factual basis for believing that age is an important indicator of job performance. The standard for establishing a factual basis for mandatory retirement from such protective service jobs should be placed

so that the risk of error favors, rather than jeopardizes, the public safety. (Pp. 17-25.)

To establish a BFOQ defense in ADEA cases where the "normal operation of the particular business" directly involves public safety, the employer should not be required to convince the factfinder in each case that the age qualification is absolutely necessary. That would be contrary to the statutory language, would place an extraordinary burden upon the establishment of a BFOQ, and would jeopardize the public safety. The ADEA requires only that the age qualification be "reasonably necessary" to the public safety function. A showing of reasonable cause, that is, a factual basis for believing, or of a rational basis in fact for believing, that age is an important indicator of ability, should suffice to

establish a BFOQ. Such a showing may be made by reasonable reliance upon responsible expert opinion or upon other sources of proof such as, in an appropriate case, congressional findings of fact, either express or implied. Under this standard, the judgment of the court of appeals should be affirmed. (Pp. 25-38.)

ARGUMENT

The decision in this case will dramatically affect the ability of state and local governments to promote public safety by establishing age limitations upon service in public safety positions such as firefighters or police officers. The rationality of such limitations was recognized, in an Equal Protection context, in Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). In

E.E.O.C. v. Wyoming, 460 U.S. 226 (1983), this Court held out the promise that States could continue to promote public safety through mandatory retirement provisions under the ADEA, if they could establish that age was a bona fide occupational qualification for such positions. This case raises the practical question of the proof which is required to establish such a public safety BFOQ.

I. CONGRESS FULLY INTENDED TO
ALLOW MANDATORY RETIREMENT
IN OCCUPATIONS WHERE AGE
IS AN INDICATOR OF JOB PER-
FORMANCE.

Age discrimination in employment results, not from dislike or intolerance for the older worker, but from erroneous assumptions about the effects of age upon performance. United States Department of Labor, Report to the Congress on Age

Discrimination in Employment under § 715 of the Civil Rights Act of 1964 (June 1965), at 2. In enacting the ADEA, Congress intended to eradicate these erroneous assumptions by prohibiting "arbitrary discrimination in employment." 29 U.S.C. § 621(b) (statement of congressional purpose) (emphasis added). As Secretary of Labor Willard Wirtz wrote to the Speaker of the House: "The legislation would clearly indicate that the prohibitions are designed to ban arbitrary age discrimination." Reprinted in 113 Cong. Rec. 1377 (January 24, 1967) (emphasis added). Members of the House of Representatives who debated passage of the ADEA in 1967 similarly directed their concerns toward arbitrary discrimination on the basis of age. See, e.g., 113 Cong. Rec. 34743 (remarks of Rep.

Mink); 113 Cong. Rec. 34744 (remarks of Rep. Pucinski) (1967).

Unlike racial discrimination, which is invidious under all circumstances, age discrimination is not invidious when there is a factual basis for believing that age is related to ability for a particular occupation. "[W]e accept the factual and legal validity of using age as a prediction of certain physical and agility skills . . . and we accept that age does so in such a sufficiently efficient manner that its use is not necessarily suspect." E.E.O.C. v. University of Texas Health Science Center, 710 F.2d 1091, 1097 (5th Cir. 1983) (Higginbotham, J., specially concurring). In including the BFOQ defense as part of the ADEA, Congress explicitly recognized that there are circumstances under which age can in

fact be an important indicator of job performance. Where "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. § 623(f)(1), it is permissible to discriminate on the basis of age, because the discrimination is not based upon assumptions or stereotypes about the ability of older workers. Thus, in the Senate hearings which preceded passage of the ADEA Secretary Wirtz stated:

[The Act] does not prohibit or apply in any way to differentiations or distinctions being made on the basis of age so far as there is legitimate relevance between age and employment capacity.

Age Discrimination in Employment Act of 1967: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 37 (1967).

The petitioners in No. 84-518 miss the point of the BFOQ exception when they rely upon generalized legislative statements concerning the ADEA's requirement that employers make individualized employment determinations, citing the statement in E.E.O.C. v. Wyoming, supra, that the ADEA requires States to make retirement determinations "in a more individualized and careful manner." 460 U.S. at 239. Brief for Robert W. Johnson, et al., at pp. 8, 34-35. This selective quotation ignores the crucial alternative which follows:

Perhaps more important, appellees remain free under the ADEA to continue to do precisely what they are doing now, if they can demonstrate that age is a "bona fide occupational qualification" for the job of game warden.

E.E.O.C. v. Wyoming, 460 U.S. at 240 (emphasis in original). This Court

there recognized the distinction between the Act's general requirement of individualized determinations on the one hand, and the role of the BFOQ on the other. That BFOQ defense embodies its own congressional purpose, which is entitled to be given full effect.

The principal guidance as to the purpose and scope of the BFOQ exception is found in the legislative history of the 1978 ADEA amendments, which focused upon the question of mandatory retirement. Age Discrimination in Employment Act Amendments of 1978, P.L. 95-256, 92 Stat. 189.* / It is disingenuous to suggest that this history indicates that manda-

* / Reliance upon the views expressed by subsequent sessions of Congress is permissible and appropriate in this case. See Heckler v. Turner, ___ U.S. ___, 53 U.S.L.W. 4211, 4218 (February 27, 1985).

tory retirement for public safety positions is "contrary to the 'primary purpose' of the 1978 Amendments." Brief for the Equal Employment Opportunity Commission at 16. Such a contention is misleading because the House Report which articulated that primary purpose continued, as follows:

"While it is the primary purpose of this legislation to limit mandatory retirement . . . , it is not intended that the bill prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular activity"

H.R. Rep. No. 95-527, pt. 1, 95th Cong., 1st Sess. 12 (1977).

The legislative history of the 1978 Amendments shows congressional concern that removing the bona fide pension plan exception's shelter for mandatory retirement provisions not result in prohibiting

mandatory retirement under all circumstances, thereby jeopardizing public safety. The Senate bill provided that 29 U.S.C. § 623(f)(1) be amended to expressly state that mandatory retirement pursuant to a BFOQ was permissible. One of the bill's managers, Senator Williams, expressing the belief that "we should not prevent mandatory retirement in those instances where age has been established as a bona fide occupational qualification," went on to explain:

President Carter . . . asked that we clearly permit the establishment of a designated retirement age of less than 70 where age has been shown to be an important indicator of job performance. For some types of work, for example, law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age will be unable to continue performing their duties. In addition, it may be impossible or impractical to determine through medical examinations and periodic re-

views of job performance the employee's capacity or ability to continue working safely and effectively.

123 Cong. Rec. 34296 (1977) (emphasis added).

The House bill did not contain such an amendment; but the House Committee on Education and Labor Report emphasized that:

[I]t is not intended that the bill prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular activity such as provided for in the current law in section 15(b) and 4(f)(1). It is recognized that certain mental and physical capacities may decline with age, and in some jobs with unusually high demands, age may be considered a factor in hiring and retaining workers. For example, jobs such as those in air traffic control and in law enforcement and firefighting have very strict physical requirements on which the public safety depends. The Committee, however, expects that age will be a relevant criteria for only a limited number of jobs.

H.R. Rep. No. 95-527, 95th Cong., 1st Sess. 12 (1977) (emphasis added). In keeping with this view that no amendment was needed to preserve mandatory retirement where age is a BFOQ, the Senate's proposed amendment to § 623(f)(1) was deleted in conference for the following reason: "The conferees agreed that the amendment neither added to nor worked any change upon present law." H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 7 (1978).

In addition to confirming that Congress fully intended that mandatory retirement could be justified as a BFOQ, this history reveals that Congress thought of public safety occupations as the context in which a BFOQ was likely to be established. It was not by chance that law enforcement and firefighting jobs were given as examples in the state-

ments quoted above. See also the following colloquy between Senators Javits and Griffin:

MR. GRIFFIN:

I do not understand what the standard is supposed to be. Would he say, for example, that if most policemen are physically unqualified after age 65 to continue to serve on the police force, then all policemen could be required to retire at 65, rather than 70?

MR. JAVITS:

If it is reasonable, factually based, and can be justified as a bona fide occupational qualification for that type of employment.

123 Cong. Rec. 34319 (1977).

This history refutes any assertion that the mandatory retirement of public safety personnel is contrary to congressional intent. Rather, it demonstrates that the primary legislative concern which underlies the BFOQ exception is public safety: where conduct of the

"particular business" requires strenuous physical duties and implicates the safety of the public, an employer may, by virtue of the exception, impose "reasonably necessary" age limitations "for that type of employment." 123 Cong. Rec. 34319 (1977) (remarks of Sen. Javits). The BFOQ defense is an important and integral part of the ADEA, and is entitled to be construed according to its language and in light of the congressional purposes which it embodies.

II. WHERE PUBLIC SAFETY IS
ACTUALLY IMPLICATED, THE
RISK OF ERROR SHOULD BE
PLACED SO AS TO FAVOR, NOT
JEOPARDIZE, IT.

The values served by the ADEA's general prohibition against age discrimination are important ones, which are shared by the amici States. The values served by a public safety BFOQ, however, are

also worthy of very serious concern -- concern which is embodied in the BFOQ provision of the Act. In most contexts, not involving public safety, mandatory retirement provisions reflect employer concern for economic efficiency. In the context of public safety, however, the concern is for the safe and effective performance of duties which are essential to the protection of human life.

In the Hearings before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 103-04 (1967), Sen. Pell voiced concern about legislation which might place "a straightjacket on endeavors which have a safety involvement." The BFOQ provision was intended to prevent such a result.

The lower courts repeatedly have held that where public safety is the essence of the business, the standard for estab-

lishing a BFOQ should not be strict. "[T]he risk of error when public safety is proved to be actually implicated is resolved in favor of safety." E.E.O.C. v. University of Texas Health Science Center, 710 F.2d 1091, 1097 (Higginbotham, J., specially concurring). See also, e.g., Murnane v. American Airlines, Inc., 667 F.2d 98, 101 (D.C. Cir. 1981); Orzel v. City of Wauwatosa Fire Department, 697 F.2d 743, 750 (7th Cir. 1983); Tuohy v. Ford Motor Company, 675 F.2d 842, 845 (6th Cir. 1982); E.E.O.C. v. County of Santa Barbara, 666 F.2d 373, 377 (9th Cir. 1982); Aritt v. Grisell, 567 F.2d 1267, 1271 n. 14 (4th Cir. 1977); Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 238 (5th Cir. 1976); Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 861, 863 (7th Cir. 1974).

The amici do not disagree with the proposition that a "factual basis" should be required to establish a BFOQ. The establishment of a BFOQ must be based upon more than mere assumptions, labels or stereotypes. The BFOQ is an affirmative defense, see E.E.O.C. v. Wyoming, supra, 460 U.S. at 240, requiring proof of a factual basis for believing that the age classification is not unreasonable or arbitrary. This affirmative burden distinguishes BFOQ analysis under the ADEA from Equal Protection analysis in an age classification context, where the burden is upon the plaintiff to establish the irrationality of the classification. See Massachusetts Board of Retirement v. Murgia, 427 U.S. 306 (1976).

Contrary to the impression which the petitioners seek to create, however,

there is a substantial factual basis to believe that age is an important indicator of job performance in public safety occupations such as firefighting and law enforcement. Experts in physiology, cardiology and related fields have successfully established this in numerous recent cases. E.g., E.E.O.C. v. City of St. Paul, 500 F. Supp. 1135 (D. Minn. 1980) (age a BFOQ for municipal firefighters), aff'd on other grounds, 671 F.2d 1162, 1167 (8th Cir. 1982) ("Although not at issue since the EEOC dismissed its cross-appeal, the district court's finding that age is a BFOQ for firefighters, fire equipment operators, and fire captains is amply supported by the record."); E.E.O.C. v. Wyoming, No. C80-0036B (D. Wyoming 1983) (jury verdict, after remand from this Court, that

age is a BFOQ for the job of game warden); E.E.O.C. v. Missouri State Highway Patrol, 748 F.2d 447 (8th Cir. 1984) (age a valid BFOQ); E.E.O.C. v. Commonwealth of Pennsylvania, 596 F. Supp. 1333 (M.D. Pa. 1984) (age a valid BFOQ for State Police); Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984), petition for cert. denied, 53 U.S.L.W. 3403 (November 26, 1984) (age a valid BFOQ for Massachusetts State Police).

The evidence in these cases necessarily supports the conclusion that there is a substantial risk to the public safety from a BFOQ standard which places too heavy a burden upon the employer. The cases represent responsible expert opinion that age is an important indicator of effective job performance for such protective service occupations; and the

existence of this expert opinion shows that an application of the ADEA which is overly protective of the rights of employees not to be discriminated against on the basis of age may place the lives of other individuals in danger. Fire-fighting and law enforcement personnel literally are called upon, in the normal course of their duties, to save human lives. The ability to perform the physical functions which are necessary to the safe and effective performance of those duties has been proven in the cases cited above, and others, to decline with age. It is not overstating matters to say that in a case where public safety is unquestionably involved, as here, human lives may depend upon the result. The qualifying language of the BFOQ that the age classifications need only be

"reasonably necessary" should be given weight in light of the implications for the public safety.

This approach to the BFOQ exception will not be open-ended, but will apply to a narrow range of occupations. The legislative history of the ADEA shows that public safety mandatory retirement is the paradigm of what Congress intended to permit under the BFOQ provision. The BFOQ section of the ADEA has generated case law limited generally to two private occupations (intercity bus drivers, and airline cockpit personnel) and two public occupations (firefighters and law enforcement). For occupations not truly implicating public safety, the courts have developed tests for keeping the scope of the BFOQ exception a narrow one. See Diaz v. Pan American World Airways,

Inc., 442 F.2d 385 (5th Cir. 1971) (Title VII sex discrimination for flight attendants); cf. TWA v. Thurston, 105 S. Ct. 613, 622 (1985) (BFOQ applicable to particular jobs). For contexts in which public safety is truly and directly implicated, however, the standard for establishing a BFOQ should not be strict. To improvidently place the risk of error would be to jeopardize the public safety.

III. PROOF OF A "FACTUAL BASIS"
IN A PUBLIC SAFETY CONTEXT
SHOULD BE SATISFIED BY
ESTABLISHING THAT THE AGE
CLASSIFICATION IS OBJECT-
TIVELY REASONABLE.

The BFOQ defense is established where the employer shows that "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). In firefighting and law

enforcement positions, the normal operation of the particular business involves strenuous and hazardous activity which is essential to the protection of the public safety.

Under such circumstances, the statute expressly provides that employers, such as state and local governments, may use an age classification if it is "reasonably necessary." The introduction of evidence showing that there is "reasonable cause, that is, a factual basis for believing" that age is a BFOQ satisfies that standard.

The "reasonable cause" standard has been adopted by most courts of appeals as an important part of a more general test which has been articulated as follows:

- (1) The classification must be reasonably necessary to the essence of the employer's business; and

(2) the employer must have reasonable cause, that is, a factual basis for believing either that all or substantially all persons within the excluded class would be unable to perform safely and efficiently the duties of the job or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.

E.E.O.C. v. University of Texas Health Science Center, 710 F.2d 1091, 1093 (5th Cir. 1983). The first component of this test is not an issue in the present context -- the protection of the public safety is the essence of the business of state and local law enforcement and fire-fighting forces, and it is precisely through the hazardous and strenuous duties of the firefighters and police officers that these public safety purposes are carried out. There is an obvious and undeniable necessary and direct relationship between the duties of, such jobs and the public safety.

The question whether the age classification is reasonably necessary to the effective performance of the public safety duties involved has generally been viewed by the courts of appeals under a "reasonable cause" standard. The BFOQ language does not require that an employer must actually prove, by a preponderance of the evidence, one or both of the subparts of the "reasonable cause" component of the test quoted above (i.e., that substantially all persons over the age cannot perform safely and efficiently the duties of the job; or that it is impractical to deal with persons over the age limit on an individualized basis). Contra, Brief for Robert W. Johnson, et al., at 6.

The two seminal cases developing standards for evaluating a BFOQ under

the ADEA, although phrasing the test differently, both recognized that some judgment and discretion should be afforded to the employer in the interest of public safety. In Hodgson v. Greyhound Lines, Inc., 499 F.2d 859, 863 (7th Cir. 1974), the court of appeals held that the BFOQ standard was satisfied by a "rational basis in fact to believe" that elimination of the age requirement would minimally increase the likelihood of risk of harm to bus passengers and other motorists, stating:

"Greyhound need not establish its belief to the certainty demanded by the Government. . . . Greyhound has amply demonstrated that its maximum hiring age policy is founded upon a good faith judgment concerning the safety needs of its passengers and others. It has established that its hiring policy is not the result of an arbitrary belief lacking in objective reason or rationale."

499 F.2d at 865 (emphasis added). In Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976), the court of appeals similarly held that the BFOQ standard was satisfied by "reasonable cause, that is, a factual basis for believing" that one or both subparts of the second component of the test quoted on pp. 26-27, above, were met, explaining:

The employer must of course show a reasonable basis for its assessment of the risk of injury/death. But it cannot be expected to establish this to a certainty, for certainty would require running the risk until a tragic accident would prove that the judgment was sound.

531 F.2d at 238 (emphasis added). For more recent cases see, e.g., Johnson v. American Airlines, Inc., 745 F.2d 988, 993-94 (5th Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3600 (1985) ("American need only show that it has a

reasonable basis for its assessment of the safety risks involved"), and Murnane v. American Airlines, Inc., 667 F.2d 98 (D.C. Cir. 1981), where the court upheld a BFOQ on the following basis:

We believe that the District Court's findings of fact . . . support the conclusion that American's hiring policies, including the age forty guideline, might result in the death of one less person than were American forced to abandon or modify these policies.

667 F.2d at 101 (emphasis added). The reasonable discretion which these cases provide for the protection of the public safety through mandatory retirement provisions pursuant to a BFOQ implements accurately the congressional intent underlying § 623(f)(1).

Notwithstanding these public safety considerations, and the "factual basis" for mandatory retirement of public safety

officers established by a series of recent trials throughout the country, petitioners argue that employers must convince the factfinder in each case that the age qualification is in fact necessary to the public safety. See, e.g., Brief for Robert W. Johnson, et al., at 12, 13; Brief for E.E.O.C. at 11, 12, 20, 21, 23, 24 (repeatedly characterizing the BFOQ as requiring that the age classification be "necessary," disregarding the qualifying adverb, "reasonably"). Many small public employers, such as towns or counties, may not have the resources to present expert testimony or the sophistication to effectively challenge the E.E.O.C.'s contrary experts as to this ultimately scientific question. Moreover, juries asked to find that age is absolutely necessary may find against

the public safety employer when the weight of the expert testimony is closely or evenly balanced. The result may be that some jurisdictions are forced to abolish mandatory retirement laws which Congress intended to be lawful under the ADEA, while other jurisdictions with similar forces validate their public safety mandatory retirement provisions at great litigation expense. Further, such results may, and already are tending to, create an incongruous checkerboard of jurisdictions with valid and invalidated BFOQ's for essentially similar jobs. Indeed, the petitioners' insistence upon a case-by-case approach with a full panoply of competing experts debating what is essentially the same question in many jurisdictions throughout the country promises to create an aggre-

gate burden upon state and local governments.

The BFOQ standard does not, and as a matter of policy should not, turn upon an endless series of battles of the conflicting opinions of expert witnesses where public safety is at stake. Rather, the existence of a BFOQ depends upon whether it is reasonable for an employer to rely upon a mandatory retirement age as being supported by responsible expert opinion or other equivalent evidence. In the area of public safety, where the risk of harm to third parties may turn upon the result, it is essential to give full force and recognition to the qualifying language of the statutory provision: the age classification must only be "reasonably necessary."

The most obvious type of proof satisfying this statutory standard would be

responsible expert opinion, such as was presented in the cases cited above at pp. 21-22 and by Baltimore in the district court in this case. Such expert opinion, without more, establishes "reasonable cause, that is, a factual basis for believing," or "a rational basis in fact to believe," that substantially all persons over the age limit are unable to perform the duties of the job safely and effectively, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis. Reliance upon responsible, qualified expert opinion is precisely the type of evidentiary standard which guards against stereotypical or arbitrary age discrimination while assuring that the public interest in preserving the public safety is protected. It provides a "factual

basis" establishing that age is a "reasonably necessary" BFOQ.

The fact that other experts disagreed with Baltimore's experts does not negate the reasonableness of Baltimore's reliance upon its experts, unless they are found to be unqualified or irresponsible. To make the result turn upon a choice between the views of several responsible experts would be to impose a burden upon Baltimore of providing that age is absolutely necessary -- a burden which exceeds the requirements of the statute.

Alternatively, it also should be reasonable to rely upon Congressional findings of fact, expressly stated or implicitly relied upon in the enactment of federal laws. In this sense, the rationale of the court of appeals could be upheld on the basis of the congressional deter-

mination to retire federal firefighters at age 55.

The amici do not address in depth the more narrow issue of whether such reliance upon cognate federal laws was justified in this particular case. However, they do note that the United States Department of Labor, Report to the Subcommittee on Labor of the Senate Committee on Human Resources (Sept. 26, 1977) stated, at 15: "To the extent that federal laws provide early mandatory retirement ages, it represents Congressional judgment that after a certain age, the specific requirement of the job cannot be met by the older worker." Reprinted at p. 338 of the Hearings on the ADEA Amendments of 1977 before the Subcomm. of Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977).

It has been eight years since Congress expressly considered this issue in the course of the 1978 Amendments, and any suggestion that the retention of the age limit of 5 U.S.C. § 8335(b) is temporary is by now untenable. Congress apparently is content that such age limits are not invidious, a conclusion which supports the rationale of the court of appeals.

CONCLUSION

The result reached by the court of appeals was correct. In articulating the standards governing the establishment of a BFOQ, this Court should require only that the public employer establish reasonable cause, that is, a factual basis, for believing that age is an important indicator of job performance. To

require more would unduly jeopardize the public safety, and would be unfaithful to the statutory language and the intent of Congress in enacting the "reasonably necessary BFOQ" exception.

Respectfully submitted,

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March, 1985

MOTION FILED

APR 3 1985

No. 84-518 and No. 84-710

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

ROBERT W. JOHNSON, et al.,
Petitioner,
v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,
v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

**On Writ of Certiorari to the United States Court
of Appeals for the Fourth Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF OF NATIONAL LEAGUE OF CITIES AS
AMICUS CURIAE IN SUPPORT OF THE RESPONDENT**

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QUESTION PRESENTED

Whether the bona fide occupational qualification ("BFOQ") under the Age Discrimination in Employment Act, 29 U.S.C. 621, *et seq.*, has been rendered meaningless by the Equal Employment Opportunity Commission's decision to challenge mandatory retirement laws affecting municipal public safety workers on a case by case basis?



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**On Writ of Certiorari to the United States Court
of Appeals for the Fourth Circuit**

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

National League of Cities moves the Court under Rule 36 for leave to file the attached brief *amicus curiae* in the above-entitled case, and in support thereof states:

(iii)

1. National League of Cities ("NLC") is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their governmental functions. Its membership includes direct member cities, state municipal leagues and state league member cities. In all, approximately 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC. The functions of NLC as authorized in its Bylaws include "the safeguarding of the interests, rights and privileges of municipalities."

2. NLC's members will be directly affected by the outcome of this case. A 1982 survey by the International City Management Association of municipalities with a population of 10,000 or more shows that 64.7 percent of the 1,058 respondents have established mandatory retirement for firefighters at an age below 70 years. The average age at which retirement was so required was 64. Granito, *Fire Personnel Practices*, International City Management Association Base Line Data Reports 12 (Feb. 1983). Another recent survey of police departments taken by the Fraternal Order of Police covering cities with populations of 25,000 or more showed that nearly 60 percent of the surveyed departments had compulsory retirement ages below 70 years of age. More specifically, of 542 systems surveyed, 316 set mandatory retirement at ages ranging from 55 to 68. Government Employee Relations Report (BNA) ¶¶ 712151-71:2177.

3. Since the Age Discrimination in Employment Act, 29 U.S.C. 621, *et seq.* ("Act"), was amended in 1974 to include state and local governments, the courts have been deluged with suits brought by the Equal Employment Opportunity Commission ("EEOC") challenging the validity of mandatory retirement laws established by states and municipalities. *See Appendix A, infra.*

4. This case presents the Court with the opportunity to clarify the circumstances in which age based, involuntary retirement of municipal firefighters and police

officers will satisfy the BFOQ exception to the Act. Clarification will put an end to the current practice of the EEOC of case by case litigation which burdens the judicial system, jeopardizes older firefighters and public safety, and disrupts planning and budgeting on the part of affected municipalities.

5. NLC wishes to participate in this case in order to provide the Court with a broader understanding of the need for clear standards that are workable in the context of local government operations and serve the purposes of the Act.

6. Consent to the filing of a brief *amicus curiae* has been sought from the parties but has been refused by counsel for the individual Petitioners, Robert W. Johnson, *et al.*

Respectfully submitted,

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On Writ of Certiorari to the United States Court
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**BRIEF OF NATIONAL LEAGUE OF CITIES AS
AMICUS CURIAE IN SUPPORT OF THE RESPONDENT**

INTEREST OF THE AMICUS CURIAE

The interests of National League of Cities are set out
in the foregoing Motion.

STATEMENT OF THE CASE

National League of Cities agrees with the statement
of the case submitted by the Respondent ("City"). In
addition, NLC wishes to call the Court's attention to the
following facts that demonstrate the importance of this
case to its constituent local governments.

This case was originally brought by six Baltimore City firefighters, covered by the City's retirement system generally requiring retirement of public safety employees at age 55, who objected to application of the age provisions of the system, challenging their validity under, among other things, the Act.

The record below shows the City's retirement age for all municipal employees was originally set at age 70; but in 1962 a separate retirement system, limited to public safety employees and providing in part for involuntary separation at age 55, was adopted—largely because of concerns expressed by the affected unions and because of mortality data they presented.

Current, detailed information on firefighter mortality compared with other occupations on a nation-wide basis is not readily available. Neither governmental nor private agencies regularly collect comparative figures on accident, disability and mortality experience giving discrete data on firefighters. Notwithstanding these deficiencies, it is generally recognized that sudden stress and exertion associated with firefighting express themselves through an incidence of cardiovascular and atherosclerotic disease well in excess of that experienced by the population at large, particularly in ages beyond 50 years. Barnard, *Heart Disease in Firefighters*, Parts I-IV, Fire Command, National Fire Protection Association (Aug.-Nov. 1979); Society of Actuaries, *Occupational Study* (1967).

In 1950, the only year for which mortality data by occupation and industry for the entire United States have been published, deaths among firefighters aged 60-64 by reason of atherosclerotic disease were more than twice as high as was the case for all occupations, 20.40 per thousand compared to 9.90 per thousand. Public Health Service, U.S. Dep't of Health, Education and Welfare, Special Reports, *Mortality by Occupation and Industry Among Men 20 to 64 Years of Age: United States, 1950*,

Vol. 53, No. 1 (1962); Public Health Service, U.S. Dep't of Health, Education and Welfare, Special Reports, *Mortality by Occupation and Cause of Death Among Men 20-64 Years of Age: United States, 1950*, Vol. 53, No. 2 (1963). See also Barnard, *supra*. A corresponding ratio of deaths obtained in the case of the 55-59 year age group, where atherosclerotic deaths per thousand among firefighters were 13.95 as compared to 6.75 for all occupations. *Id.*

The same pattern appeared where all cardiovascular diseases were considered. Death rates from cardiovascular disease per thousand for firefighters aged 60-64 and 55-59 were 38.51 and 21.18, respectively, compared to 17.20 and 11.26, respectively, for the corresponding age groups in all occupations. *Id.*

Nor do more current figures indicate any lessening of the toll taken by heart disease on aging firefighters: The 1982 Annual Death and Injury Survey taken by the International Association of Fire Fighters shows that the average age of firefighters dying from heart attacks in that year was 55 years; that heart attacks were responsible for 41.6 percent of all reported line of duty deaths among firefighters (the largest single cause); that heart disease was the cause of over 69 percent of firefighter retirements due to occupational disease; and that the average age of those so forced to retire in 1982 was 51 years.

Under these punishing circumstances, self-selection out of the fire service generally takes place at an age younger than the mandatory retirement age under consideration here. Appendix B contains a chart prepared from 1980 Census data showing the distribution, by age, of active firefighters (exclusive of inspectors and supervisory personnel) contrasted with the corresponding distribution of the United States work force in all occupations. These data show that the percentages of firefighters concentrated in the younger age groups 25-34 (40.2%) and 35-44

(28.5%) far exceed the percentages in the same age groups in the case of the general work force (28.5% and 19.9%, respectively). By contrast, Appendix B shows the proportions to be markedly reversed for age groupings 45-54 and 55-64, after which only three-tenths of one percent of all firefighters are age 65 or over compared with three percent for all occupations. Put another way, the chart demonstrates that the hazards involved make firefighting a young person's profession. Mandatory retirement ages have little bearing on the fact that firefighters leave their occupation, either by reason of death, disability, voluntary retirement or change of work, at ages well below those that prevail for all other occupations.

Acknowledging the physical problems firefighting creates among older personnel, the International Association of Fire Fighters as recently as May of 1984 urged Congress to amend the Act so as to exclude firefighters from coverage and to permit their mandatory retirement:

Most arbitrary age discrimination occurs due to stereotyping that is largely unsupported by objective facts. It was precisely this sort of discrimination that the [Act] was created to prohibit. However, there are instances that the [Act] does not address where a mandatory retirement age and a maximum hiring age are crucial to the professional and competent operation of specific professions. Most often, great physical and mental demands are inherent elements of these professions. We believe that employment policies which consider age as an eligibility factor for professions that require great physical and mental exertion are based on objective facts and hence have merit.

Various studies have illustrated the fact that younger fire fighters can better cope with the strains of fire fighting than can older ones due to the physical infirmities that characteristically afflict older men and women. Simply, the older the fire fighter is the greater the odds are that he or she will become

injured, disabled, or die while on duty. Age Discrimination in Employment Act Amendments, Hearings on H.R. 2161, H.R. 3093, H.R. 5310 Before Subcomm. on the House Comm. on Education and Labor, 98th Cong., 2d Sess., 86 (1984).

It was in response to corresponding representations on the part of the affected unions and employees, as well as in the interest of public safety, that the City of Baltimore in 1962 established 55 years as the mandatory retirement age for its firefighters and police officers.

SUMMARY OF ARGUMENT

The Act provides that age may be used as a "bona fide occupational qualification" where "reasonably necessary to the normal operation of the particular business." 29 U.S.C. 623(f)(1). Congress gave EEOC authority under the Act to "cooperate" with state and local governments and to "establish . . . reasonable exemptions to and from any or all provisions of [the Act]." 29 U.S.C. 625(b), 628.

Nevertheless, regulations published by EEOC, coupled with that agency's practice of repeated intervention in cases involving mandatory retirement of state and local public safety officers, demonstrates that, in practice, municipal governments cannot rely on the BFOQ defense under any circumstances. Instead they must be prepared to defend mandatory retirement ages on a case by case basis. Moreover, in some instances the Courts of Appeal have drawn standards for the BFOQ so narrowly as to force the same practical result. See, e.g., *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).

The Court has acknowledged in *EEOC v. Wyoming* that, the Act notwithstanding, states and localities remain free to establish BFOQ's so long as they meet a federal standard of reasonableness. 460 U.S. 226, 240 (1983). The Court below found such a standard in Con-

gress' determination that federal firefighters may be required to retire at age 55. See 5 U.S.C. 8335 (b).

In the event the Court should conclude to the contrary, NLC urges that the Court establish clear and workable guidelines to put an end to the uncertainties resulting from the failure of EEOC to provide guidance clarifying the circumstances under which mandatory retirement of firefighters and other public safety personnel prior to age 70 is permissible.

ARGUMENT

I. In Addition to Physical Hazards to the Participants and the Public, the Indeterminate Retirement Age Resulting From EEOC Practice Needlessly Disrupts the Municipal Planning, Budgeting and Hiring Process.

Putting to one side the risks to older firefighters of continuing in service and the accompanying hazard to their colleagues and the public, there remains to be noted the potential for disruption of "the normal operation of the particular business" of running a city such license presents. 29 U.S.C. 623(f) (1).

Municipal firefighters and other public safety personnel are compensated by salaries and retirement benefits commensurate with the risks involved. To ensure that these financial obligations are met, municipalities establish compensation plans which provide relatively high salaries for active personnel and relatively generous pension benefits at an early retirement age. Salary levels and retirement benefits are generally related, with retirement benefits calculated on the basis of the final year's salary (or a similar base). These obligations are met almost entirely with tax dollars and, as a consequence, cities are obligated to establish long-term plans for meeting their financial requirements. A mandatory retirement age clearly establishes the maximum number of years during which a firefighter may be a salaried employee; it also

establishes with some certainty the date on which a city will become obligated to pay retirement benefits.

After determining the revenues which a city must budget in a particular year for salaries and retirement benefits, the city must go on to address related issues, such as the number of active firefighters needed in a particular year and how its staffing obligations may be affected under Title VII of the Civil Rights Act of 1964.

Neither such financial nor staffing decisions can be realistically made, however, in any city in which the validity of a mandatory retirement age has not yet been adjudicated under the Act.

II. Cities Are Often Required by State Law to Maintain Mandatory Retirement Ages for Public Safety Personnel.

In many states the legislature has established mandatory retirement ages for state and local public safety personnel. These mandatory retirement ages are often included in laws defining pension benefits for retired police officers or firefighters, and where disregarded may jeopardize eligibility for retirement benefits. In California, for example, firefighters may be involuntarily retired at age 60 after 20 years of service and are entitled to 50 percent of the salary received in the year prior to retirement. CAL. GOV'T CODE § 50870. In New Jersey, police officers and firefighters are required by state law to retire at age 65. N.J. REV. STAT. § 17:4-6.14. *See also* MASS. GEN. LAWS ANN. Ch. 32, § 83A(d) and WYO. STAT. § 15-5-307. Indeed, the Chief Justice recently noted that over one half the states have mandatory retirement laws that may violate the Act. *See Wyoming, supra*, at 253, n.2 (Burger, C.J., dissenting).

Plainly unless this Court establishes clear standards for determining a BFOQ of general application municipalities will continue to be caught between the mandates of state law and the EEOC enforcement process.

III. EEOC's Case By Case Approach to Mandatory Retirement Nullifies Congress' Intent to Provide a BFOQ Defense.

Regulations published by EEOC under the Act force case by case adjudication of the validity of all mandatory retirement ages which are less than 70 years, including retirement ages for public safety personnel:

Whether occupational qualifications will be deemed to be "bona fide" . . . will be determined on the basis of *all the pertinent facts surrounding each particular situation*. 29 C.F.R. 1625.6(a) (emphasis added).

And further:

An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. *If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact*. 29 C.F.R. 1625.6(b) (emphasis added).

In pursuit of this standard, EEOC has since 1979 brought over 30 lawsuits against state and local governments alleging violations of the Act in the case of public safety personnel. See Appendix A, *infra*.

In addition to disrupting "normal operations" of local government, lawsuits in such numbers have imposed (and EEOC's policies will continue to impose) an unwarranted burden on the courts. Moreover, the courts have been unable to establish clear and consistent BFOQ standards applicable to public safety officers. See *Orzel v. Wauwatosa Fire Dep't*, 697 F.2d 743 (7th Cir. 1983) (mandatory

retirement age of 55 for firefighters is not a BFOQ); *Campbell v. Connelie*, 542 F.Supp. 275 (N.D. N.Y. 1982) (mandatory retirement age of 55 for state police is not a BFOQ); *EEOC v. Minneapolis*, 537 F.Supp. 750 (D. Minn. 1982) (mandatory retirement at 65 for police captains is not a BFOQ). *But see EEOC v. Commonwealth of Pennsylvania*, 596 F. Supp. 1333 (M.D. Pa. 1984) (mandatory retirement age of 60 for state policemen is a BFOQ); *EEOC v. St. Paul*, 500 F. Supp. 1135 (D. Minn. 1980) (mandatory retirement age of 65 for employees of fire department is a BFOQ); *Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir. 1984) (mandatory retirement age of 50 for state police is a BFOQ); *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984) (mandatory retirement age of 60 for state troopers is a BFOQ).

If the validity of mandatory retirement ages for public safety personnel continues to be litigated on a case by case basis, hundreds of lawsuits could be involved, many involving the same witnesses, with no assurance based on results to date that any mandatory retirement age short of 70 years of age can safely be regarded as a BFOQ.

IV. The Court Should Impose Guidelines for a Workable BFOQ Covering Local Public Safety Officials.

The immediate aim of this brief is to urge that the decision of the Court of Appeals be affirmed. But, more important, NLC wishes to call to the attention of the Court the dilemma which confronts hundreds of municipal officials charged with the responsibility of providing their communities with adequate fire protection services consistent with safety for firefighting personnel and, at the same time, compliance with the mandates of the Act.

The Court should take notice of the fact that firefighting is the most physically demanding of occupations. To permit firefighters to serve in this exacting activity until they reach the age of 70 is neither in the public interest nor

in the interests of firefighters. Clearly these judgments are based upon reasonable perceptions of reality rather than predilections of city officials to stereotype firefighters on the basis of age.

The Act recognizes the need and the appropriateness of an age specific retirement standard for firefighters provided there is a reasonable relationship between the normal function of the employing organization, the demands of the job, and the age of the employees.

Accordingly, the issue facing municipal officials is what mandatory retirement age for firefighters will be regarded under the dictates of the Act not as a manifestation of age based discrimination, but rather as an acceptable occupational qualification?

Although given ample authority to resolve this question, EEOC has chosen to resort to the judicial process as if every mandatory retirement age for firefighters of less than 70 years is a question of first impression.

NLC urges this Court to recognize that the validity of a mandatory retirement age is not simply the ultimate probity of the scientific and medical evidence employed. Rather, the issue should be whether the age chosen has a reasonable relationship to the demands of the work.

The Court of Appeals has chosen a reasonable and pragmatic solution to these questions. It concluded that a mandatory retirement age adopted by a municipality after fair and open negotiations between the representatives of the interested parties, which retirement age also coincided with a federal retirement statute for the same occupation, was not the age based discrimination interdicted by federal law. Instead the selected age was reasonably related to the occupational requirements in question and consequently consistent with the non-discriminatory mandate of the Act.

Should this Court find it necessary to reject the Court of Appeal's realistic solution, NLC respectfully requests

that the Court supply further guidance on the application of the BFOQ. Responsible municipal officials in communities across the nation are confronted with substantially the same questions and issues as are before this Court in this matter. Such officials (and EEOC) require standards and guidance that will serve permanently to end these controversies.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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APPENDIX A

EEOC v. City of Allen Park, No. 79-72986 (W.D. Mich., filed July 25, 1979) (mandatory retirement age of 57 for municipal police officers and firefighters); *EEOC v. Janesville and State of Wisconsin*, No. 79-48 (W.D. Wisc., filed Oct. 19, 1979) (mandatory retirement age of 65 for "protective occupations"); *EEOC v. Marathon County Sheriff's Dep't and State of Wisconsin*, No. 79-559 (W.D. Wis., filed Dec. 11, 1979) (state law mandating retirement at age 55 for state and local police officers); *EEOC v. City of St. Paul and State of Minnesota*, No. 3-79-630 (D. Minn., filed Dec. 18, 1979) (state law mandating retirement for all firefighters at age 65); *EEOC v. State of Louisiana and Louisiana State University*, No. 80-0280 (E.D. La., filed March 28, 1980) (state law mandating retirement at age 65 of state employees engaged in public safety occupations); *EEOC v. City of Clintonville*, No. 80-C-708 (E.D. Wisc., filed Aug. 1, 1980) (mandatory retirement age of 57 for the city's police chief); *EEOC v. City of Ecorse*, No. 80-7-3383 (E.D. Mich., filed Sept. 4, 1980) (mandatory retirement age of 60 for municipal fire chief); *EEOC v. City of Fort Smith*, No. FS-C-80-2158 (W.D. Ark., filed Sept. 17, 1980) (mandatory retirement age of 62 for city's assistant fire chief and fire captain); *EEOC v. County of Dane*, No. 80-C-578 (W.D. Wisc., filed Nov. 3, 1980) (mandatory retirement age of 60 for county law enforcement personnel); *EEOC v. City of Altoona*, No. 81-418 (W.D. Pa., filed March 18, 1981) (state law mandating retirement of oldest firefighters first in any economically necessary personnel cutback); *EEOC v. City of Hamtramck*, No. 81-71353 (E.D. Mich., filed April 29, 1981) (mandatory retirement after 30 years of service for chief of city's fire department); *EEOC v. City of Lansing*, No. G81-281 (W.D. Mich., filed May 28, 1981) (mandatory retirement age of 60 for municipal firefighters); *EEOC v. State of Wyoming*, No. C81-0180 (D. Wyo., filed July

9, 1981) (state law mandating retirement at age 65 for any state or local employee who is a member of the state retirement system); *EEOC v. City of Riverview*, No. 81-72427 (E.D. Mich., filed July 16, 1981) (mandatory retirement age of 50 for police officers after 25 years of service); *EEOC v. Town of Chesterton*, No. H-81-398 (N.D. Ind., filed July 7, 1981) (mandatory retirement age of 60 for law enforcement personnel); *EEOC v. City of Highland Park*, No. 81-27260 (E.D. Mich., filed August 8, 1981) (mandatory retirement age for city police chief); *EEOC v. City of Houston*, No. H-81-2485 (S.D. Tex., filed Sept. 25, 1981) (mandatory retirement age of 65 for all fire department personnel); *EEOC v. State of Michigan*, No. G81-756-CA5 (W.D. Mich., filed Sept. 3, 1981) (state law mandating retirement of state police officers at age 56); *EEOC v. City of Minneapolis and Minnesota Police Relief Association*, No. 4-81-660 (D. Minn., filed Oct. 9, 1981) (mandatory retirement age of 65 for police captain); *EEOC v. Missouri State Highway Patrol*, No. 82-4219-CV-C-5 (W.D. Mo., filed July 7, 1982) (mandatory retirement age of 60 for state troopers); *EEOC v. City of Newcastle and Commonwealth of Pennsylvania*, No. 82-1881 (W.D. Pa., filed Sept. 9, 1982) (state law requiring that the oldest firefighters be retired first if there is a reduction in force); *EEOC v. City of Portland*, No. 83-50 (D. Ore., filed Jan. 13, 1983) (mandatory retirement age of 65 for police captains); *EEOC v. Pennsylvania State Police*, No. 83-0321 (M.D. Pa., filed May 9, 1983) (state law mandating retirement at age 60 for state police officers); *EEOC v. City of Knoxville*, No. 3-83-364 (E.D. Tenn., filed June 13, 1983) (mandatory retirement age of 60 for police officers and firefighters after 25 years of service); *EEOC v. Indiana Dep't of Natural Resources*, No. IP83-858-C (S.D. Ind., filed June 27, 1983) (state law mandating retirement of state conservation law enforcement personnel at age 60); *EEOC v. California Office of State Marshall*, No. 5-83-856-LKK (E.D. Cal., filed July 28,

1984) (mandatory retirement age of 65 for state fire marshals); *EEOC v. City of New Castle*, No. 83-1899 (W.D. Pa., filed Aug. 11, 1983) (mandatory retirement age of 65 for police officers); *EEOC v. California Public Employees Retirement System*, No. 83-943-MLS (E.D. Cal., filed Aug. 22, 1983) (state law mandating retirement of municipal public safety personnel at age 60); *EEOC v. Indiana State Police*, No. IP-83-1207-C (S.D. Ind., filed Aug. 29, 1983) (state law mandating retirement of state police officers at age 55); *EEOC v. Mississippi State Tax Commission*, No. J83-0717(B) (S.D. Miss., filed Sept. 9, 1983) (mandatory retirement age of 65 for revenue inspectors and enforcement officers); *Crevier v. City of East Providence*, No. 83-0470-S (D. R.I., intervenor motion filed on Sept. 28, 1983) (mandatory retirement age of 65 for police department personnel); *EEOC v. City of Pittsburgh*, No. 83-2712 (W.D. Pa., filed Oct. 27, 1983) (mandatory retirement age of 65 for police officers); *EEOC v. Port of Portland*, No. 83-1821 (D. Ore., filed Nov. 29, 1983) (mandatory retirement age of 60 for firefighters); *EEOC v. State of New York*, No. 84-CV-12 (N.D. N.Y., filed Dec. 12, 1983) (mandatory retirement age of 55 or 60 depending on rank for state police); *EEOC v. State of Florida*, No. 84-7039-WS (N.D. Fla., filed Feb. 6, 1984) (mandatory retirement age of 62 for state highway patrol officers); *EEOC v. Borough of Coraopolis*, No. 84-736 (W.D. Pa., filed March 26, 1984) (state law mandating the retirement of the oldest firefighters during a reduction in force); *EEOC v. Sayad*, No. 84-0894-C(3) (E.D. Mo., filed April 18, 1984) (mandatory retirement age of 65 for St. Louis police officers); *EEOC v. County of Los Angeles*, No. 84-3181-KN (MCX) (mandatory retirement age of 60 for public safety personnel); *EEOC v. Commonwealth of Massachusetts*, No. 84-1539-MA (D. Mass.) (state law mandating the retirement of municipal firefighters at age 65); *EEOC v. New Mexico State Police*, No. 84-797-BB (D. N. Mex., filed May 21, 1984) (state

law mandating the retirement of state police personnel at age 62); *EEOC v. New York City Housing Authority*, No. 84-CIV-4547 (S.D. N.Y., filed, June 27, 1984) (mandatory retirement age of 63 after 20 years of service for housing authority police); *EEOC v. Commonwealth of Massachusetts*, No. 84-2595-MA (D. Mass., filed Aug. 22, 1984) (mandatory retirement age of 65 for municipal firefighters); *EEOC v. Commonwealth of Kentucky*, No. CA-84-62 (E.D. Ky., filed Aug. 29, 1984) (state law mandating the retirement of state police officers at age 55); *EEOC v. City of St. Louis*, No. 84-2063-C(5) (E.D. Mo., filed Aug. 29, 1984) (mandatory retirement age of 60 for firefighters); *EEOC v. City of Yonkers*, No. 84-CIV-6831 (S.D. N.Y., filed Sept. 21, 1984) (mandatory retirement age of 64 for police officers and firefighters).

APPENDIX B



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No. 84-518, No. 84-710

Supreme Court, U.S.
FILED

APR 6 1985

ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL.,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

**BRIEF OF MAYOR AND CITY COUNCIL
OF BALTIMORE**

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April, 1985

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Do the provisions of Baltimore's retirement ordinance pertaining to mandatory retirement of firefighters satisfy a reasonable federal standard under this Court's ruling in *EEOC v. Wyoming*?

2. Where a municipality, pursuant to its obligation to protect the safety of its citizens, imposes an age 55 BFOQ on its firefighters, what standards govern the review of that BFOQ by a trial court evaluating an ADEA Section 4(f)(1) defense?

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No. 84-518, No. 84-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL.,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

**BRIEF OF MAYOR AND CITY COUNCIL
OF BALTIMORE**

STATEMENT

The Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq., specifically allows an employer to retire occupational qualification "reasonably necessary to the normal operation of the particular business, or where the differentiation is based upon reasonable factors other than age." Section 4(f)(1), 29 U.S.C. 623 (f)(1).

The District Court found that on the record, respondents "have not met their burden of proving that it is impossible or highly impractical to deal with the retirement of Baltimore City firefighters between the ages of sixty and sixty-five on an individualized basis." 515 F. Supp. at 1295.

The Fourth Circuit reversed, finding that Baltimore's mandatory retirement policies satisfied the reasonable federal standard required by the bona fide occupational qualification exception to the Age Discrimination in Employment Act.

SUMMARY OF ARGUMENT

Prior to the Age Discrimination in Employment Act of 1967 ("ADEA"), employers were free to apply any conceivable policy of mandatory retirement to their employees. Congress found that, insofar as mandatory retirement policies were irrational, the Nation was deprived of the benefits of the labor of older Americans without justification.

The legislative history of the ADEA shows beyond doubt that the legitimate interests of employers were to be protected by the bona fide occupational qualification exception ("BFOQ") set forth in Section 4(f)(1). Various legitimate concerns of the employer were recognized by Congress, including the concern that application of the Act should not imperil the public.

Furthermore, the legislative underpinnings of the Act reveal that Congress perceived age discrimination in a way fundamentally different from forms of discrimination based upon immutable characteristics. Age may often serve as a legitimate basis for distinction, but gender and race will almost never be considered a permissible basis for making distinctions in employment practices. Accordingly, the scope of the Act will necessarily determine the way in which exceptions to it are interpreted. As the type of discrimination becomes less justified, the exceptions will be more narrowly construed. Conversely, where the type of discrimination consists of arbitrary or irrational assumptions, the exception will not be applied as strictly.

To the extent that the BFOQ is determined to require a factual basis for its actions, Baltimore supplied a sufficient factual predicate for its mandatory retirement policies, a point not emphasized by the Circuit Court, and totally

ignored by the District Court. Baltimore's retirement policies were based upon identical policy consideration to those found by Congress to require a mandatory retirement statute for the Nation's firefighters. The development of Baltimore's retirement ordinance parallels that of the Federal statute. Any contention that Congress did not intend that its firefighters be subject to the reasonable general rule of mandatory retirement under 5 U.S.C. 8335(b) is simply contrary to the legislative history and the enormous body of evidence produced by the Federal agencies concerned.

Baltimore rejects the EEOC's suggestion that Congress acted arbitrarily in establishing mandatory retirement for Federal firefighters and law enforcement officers. Baltimore also rejects the contention that Congress established one set of principles for judging Federal retirement policies, and another, nearly impossible, set for local governments employing people to do jobs identical to those subject to Federal policies. Baltimore asserts that 1) Congress does not have the ability to establish heightened levels of judicial scrutiny to be applied to non-Federal employment, while permitting Federal employees identically situated to receive different treatment, and 2) if Congress has that authority, there is no legislative history indicating that Congress used it here.

The practical effect of applying the test formulated in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), which upheld a BFOQ for intercity bus drivers, deprives a local government of the ability it needs to regulate the retirement of its public safety employees. In this case, application of the District Court's opinion will require Baltimore to subject its firefighters to experimentation, or totally abandon any kind of retirement policy. Irrespective of how the BFOQ is applied, Baltimore justified its mandatory retirement practices to the extent required by the Act.

ARGUMENT

THE MANDATORY RETIREMENT AGE WHICH THE MAYOR AND CITY COUNCIL OF BALTIMORE ESTABLISHED FOR ITS PUBLIC SAFETY EMPLOYEES IS BASED UPON A BONA FIDE OCCUPATIONAL QUALIFICATION.

It is fundamentally wrong to apply the Age Discrimination in Employment Act to the citizens of Baltimore in a way which is certain to cause unnecessary death and illness. The law was never intended to be applied with this result, and it has only been because of the tortured application of the bona fide occupational qualification "exception" ("BFOQ"), Section 4(f)(1), 29 U.S.C. 623 (f)(1), that Baltimore faces a potential obligation literally to experiment with the lives of its firefighters, and endanger the safety of its citizens.

The Mayor and City Council of Baltimore has been a leader among the States and other political subdivisions of the Nation in developing progressive and humane retirement policies for its employees. In fact, Baltimore eliminated arbitrary judgments about its employees in 1926, more than a half-century before the Federal government did likewise.

Based upon its legislative judgment and experience, as well as evidence produced by the protective service occupations, Baltimore determined that in the interest of public safety, employees in those occupations should be mandatorily retired. This determination was not a blind and unthinking whim, but a humane and necessary response to the problems which we experienced in protecting and serving the citizens of Baltimore.

I. THE PARALLEL FEDERAL PROVISION CONSTITUTES A BONA FIDE OCCUPATIONAL QUALIFICATION FOR FIREFIGHTERS.

A. The Legislative History of the ADEA and the Bona Fide Occupational Qualification.

Throughout the legislative history of the Age Discrimination in Employment Act ("ADEA"), Pub. L. 90-202, 81 Stat. 602, codified as 29 U.S.C. Sections 621-4, Congress was careful to preserve the legitimate interests of employers to structure a safe and efficient workforce.

The ADEA had its roots in the Equal Employment Opportunity Act of 1962 (H.R. 10144), introduced in the 87th Congress. House Report No. 1370 (February 21, 1962) (Equal Employment Opportunity Commission, *The Legislative History of the Age Discrimination in Employment Act* (1982) pp. 1-2) ("Leg. His. ADEA") Some elements of that bill provided the basis for provisions included in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) et seq. *Ibid.*; Leg. His. ADEA, p. 1, n.1. Even in that seminal bill, the House Labor Committee was careful to state that:

[S]uch discrimination [because of age] will be prohibited only when the reasonable demands of the position do not require such an age distinction.

. . .

Ibid.; Leg. His. ADEA, p. 2. The age distinctions which Congress sought to abolish were those unsubstantiated assumptions which deprived the Nation's commerce of the benefits of the older worker's labor. However, the exceptions to the Act, including the bona fide occupational qualification, were so patently obvious that they have commanded little attention from Congress. It was so evident that youth was a crucial requirement of a small core of occupations that the BFOQ provision was accepted with scant debate; not because the BFOQ provision was of minor importance, but because its justification was so clear. In connection with the amendment to include age within the provisions of Title VII, Senator Humphrey stated:

All Senators know that age is often a factor in employment. I am sure neither the Senator from

Louisiana nor any other Senator would want to have job factors established so that age would not be important, for example, in a person working on a superstructure on the 86th floor of a skyscraper. Everybody knows age is important in selective types of employment where there are dangerous pursuits and occupations.

110 Cong. Rec. 13491 (June 11, 1964); Leg. His. ADEA, p. 13.; Department of Labor, *The Bona Fide Occupational Qualification and Reasonable Factors Other Than Age Exception to Federal Age Discrimination in Employment Act of 1967: The Rule Proved, (Unpublished)*, p. 7) (Page references are to Second Draft) ("DOL Report").

While the attempt to include age within the provisions of Title VII was defeated, the Secretary of Labor was directed to prepare a Special Study of the "factors which might tend to result in discrimination in employment because of age" and "include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age. . . ." Pub. L. 88-352, Section 715; Leg. His. ADEA, p. 15.

Secretary of Labor Wirtz responded with a thoughtful and incisive statement of the problem of age discrimination:

The Congressional directive was carefully and precisely worded, avoiding prejudgment of the influence of discrimination on the employment of older workers, recognizing subtly that not all discrimination in this area is "arbitrary," asking a broad consideration of all "factors which might tend to result in discrimination" in employment because of age. . . .

The development of responsible and effective public policy regarding discrimination based on age requires as steadfast and unfearing confrontation of reality as did the development of a national policy opposed to discrimination based on race,

color, religion, sex, or national origin. But there is an essential difference.

The Nation has faced the fact — rejecting inherited prejudice or contrary conviction — that people's ability and usefulness is unrelated to the facts of their race, or color, or religion, or sex, or the geography of their birth. Having accepted this truth, the easy thing to do would be simply to extend the conclusions derived from it to the problem of discrimination in employment based on aging, and be done with the matter. *This would be easy — and wrong.*

Report of the Secretary of Labor to Congress Under Section 715 of the Civil Rights Act of 1964: The Older American and Age Discrimination in Employment (1965) p. 1; Leg. His. ADEA, p. 19, emphasis supplied.

To the misfortune of the cities and states of this Nation, the U.S. Equal Employment Opportunity Commission ("EEOC") has had considerable success in seducing courts into following this "easy and wrong" approach to defeat the legitimate concerns of subdivisions providing fire and police protection to their citizens. Congress clearly and repeatedly stated that its aim was to eliminate an employer's ability to base its practices upon mere whim or speculation; but it was careful not to interfere with employment decisions which were reasonably related to important public objectives. According to the Secretary of Labor's report:

The most closely related kind of discrimination in the non-employment of older workers involves their rejection because of assumptions about the effect of age on their ability to do a job when there is in fact no basis for these assumptions. It is this which Congress refers to, in Section 715 of the Civil Rights Act, as "arbitrary discrimination."

A third type of discrimination — which should perhaps be called something else entirely — involves decisions not to employ a person for a

particular job because of his age when there is in fact a relationship between his age and his ability to perform the job. The only reason for marking out this third area is that it clearly does exist so far as the age question is concerned, but does not exist so far as, for example, racial or religious discrimination are concerned.

Ibid., p. 2; Leg. His. ADEA, p. 20.

There are important and well-defined differences between discrimination in employment because of age, and invidious discrimination which Congress combatted elsewhere. There comes a time when distinctions based on age are justifiable, because at some point age is inherently related to ability. Moreover, when employment discrimination on account of age exists, it results from conjecture, not hostility towards individuals over the age of 40. 90 Harv. L. R. 380 (1976), p. 383 n.19. It seems anachronistic today, but at the time when the ADEA was being debated, it was the industry norm for airlines to retire "stewardesses" mandatorily at 32 years of age. Private employers were free to retire mandatorily an employee, or otherwise discriminate against him or her on the basis of age, for good reasons, bad reasons, or no reasons at all.¹ Accordingly, Congress fashioned the legislative cure to remedy the perceived ill:

Discrimination in employment based on race, religion, color, or national origin is accompanied by and often has its origins in prejudices that originate outside the sphere of employment. There are no such prejudices in American life which apply to older persons and which would carry over so strongly into the sphere of employment.

The process of aging is inescapable, affecting everyone who lives long enough. . . . The element

¹ The arbitrary nature of this particular practice was made plain when Congress noted that a flight attendant forced out of the passenger cabin because of mandatory retirement at age 32 could legally fly the plane for 28 more years.

of intolerance, of such overriding importance in the case of attitudes toward other groups, assumes minimal importance in the case of older people and older workers. . . .

We have found no evidence of prejudice based on dislike or intolerance of the older worker. The issue of discrimination revolves around the nature of the work and its rewards, in relation to the ability or presumed ability of people at various ages rather than around the people as such. This issue thus differs greatly from the primary one involved in discrimination on the basis of race, color, religion, or national origin, which is basically unrelated to ability to perform work.

* * * * *

There are unquestionably some jobs involving physical demands so unusual that it represents not only good business sense but common decency not to assign them to workers whose age increases the possibility of some weakening of body tissue.

Ibid., p. 8; Leg. His. ADEA p. 25.

In summarizing the basis for the bona fide occupational qualification the Secretary of Labor wrote:

[The Act] does not prohibit or apply in any way to differentiations or distinctions made on the basis of age as far as there is legitimate relevance between age and employment capacity. The "discrimination" it is directed against is "unjust" or "arbitrary" distinction (which is what "discrimination" is normally taken to mean) which may be made in the *absence of any legitimate relevance between age and employment capacity*.

Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st. Sess. (1967) ("Senate 1967 Hearings"), p. 37 (Statement of Secretary of Labor Willard Wirtz); (DOL Report at p. 14.) Secretary Wirtz specifically noted that his interpretation

of the prohibition of "discrimination" in the bills before Congress meant "*arbitrary* age discrimination," and that this view was reflected in the exceptions to the bills' prohibitions, including the BFOQ. DOL Report, n.62, quoting Senate 1967 Hearings. (Emphasis in DOL Report.)

Senator Javits stated that his proposal was:

[A]n effort to do something about discrimination in employment because of age. . . . [I]t has the basic bona fide occupational qualification provision which takes care of any problems which could arise in connection with it.

[T]he provision exempts an age distinction from any part of the prohibition with respect to discrimination when such an age distinction is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

Mr. President, *these are words of art to take care of any valid employment problem because of age.* We are not trying to require the hiring of 65-year-old ladies — distinguished as they may be — to be airline stewardesses, or to fit men and women who are square pegs into round holes, or anything of that kind.

112 Cong. Rec. 20820 (1966) (Remarks of Senator Javits); Leg. His. ADEA, p. 51; DOL Report at p. 13 (Emphasis supplied). Almost all of the members of Congress, the witnesses appearing before the subcommittees of the House of Representatives and the Senate holding hearings, and those submitting written material agreed either explicitly or implicitly that a BFOQ should be included in any legislation attempting to deal with age discrimination in employment. (DOL Report at p. 13, n.60.) The record of the Congressional hearings on the bills which were to become the ADEA contain repeated references to the BFOQ exception but few substantive discussions of the meaning of the exception. (DOL Report at p. 13.)

Much of the difficulty for cities and towns providing emergency services arose when Congress selected words of art which had previously been used in connection with other forms of discrimination. The judicial interpretation of the BFOQ exception to Title VII is predicated upon the evil which Congress sought to eradicate. The legislative history should leave little doubt that Congress did not intend that tests appropriate for Title VII discrimination be applied to age discrimination. Baltimore argued below that the BFOQ test applied by the District Court is incorrect, and that this Court should enforce the ADEA as it was intended by Congress to be enforced.

Congress incorporated in the Act exceptions which would have been utterly unthinkable in connection with the eradication of other kinds of discrimination. For example, in addition to exceptions for the BFOQ and reasonable factors other than age, the ADEA as enacted contained exclusions for bona fide executives or policy makers and certain tenured employees of higher education institutions. Sections 12(c)(1), (d). Even the maintenance of a balanced work-force was considered a legitimate employer concern, to be protected by exceptions to the Act. Leg. His. ADEA p. 80.

The history of the Act, as it passed through the legislative process, proves beyond doubt that Congress intended the BFOQ provision to take "into full consideration the problems and interests of employers." Leg. His. ADEA p. 157. In other words:

The bill recognizes fully the legitimacy of employment decisions, practices, and arrangements which take account of the facts — where they are facts — of the relationship between age and capacity.

Leg. His. ADEA p. 158.

The Fourth Circuit's conclusion, following *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983), that Baltimore's policies

are to be judged against a reasonable federal standard is well-founded. That employment practices must be a reasonable reflection of the hazards and exigencies in the employment pervades the legislative history of the Act. When the employer's practices are not arbitrary, the Act does not prohibit an employer from establishing a reasonable general rule.

B. The Requirement that a Bona Fide Occupational Qualification Be Supported by A Reasonable Basis in Fact.

Petitioners cite a section of the legislative history of the ADEA which they claim supports a "case-by-case" analysis, meaning a "lawsuit-by-lawsuit" determination of whether an employer's mandatory retirement practices are justified by a BFOQ (Johnson Br. 10). We set out the paragraphs immediately preceding that section to show that Congress did not intend a "lawsuit-by-lawsuit" determination of BFOQ's in areas where the employer's practices were created in response to extraordinary problems:

The Committee recognizes . . . that bona fide age requirements do exist for some positions designed to give employees knowledge and experience which can reasonably be expected to aid in developing capabilities for future advancement to executive, administrative, or professional positions, and expects the Secretary to appropriately recognize such requirements.

* * * * *

In the trucking industry, regulatory agencies, for the safety and convenience of the public, have imposed requirements as to the physical qualification of the drivers. It is, of course, not the purpose of this legislation to require the employment, regardless of age, of one not otherwise qualified in such instances. The case-by-case basis should serve as the underlying rule in the admin-

istration of the legislation. Too many different types of employment occur for the strict application of general prohibitions and provisions.

It is enough that the bill outlines a national policy against discrimination in employment on account of age, provides a vehicle for enforcement of the policy, and establishes broad guidelines for its implementation.

H.R. Rep. No. 805, 90th Cong., 1st Sess. (October 23, 1967), p. 7; Leg. His. ADEA p. 80. The "case-by-case" analysis referred to in the legislative history was clearly an "employment-by employment" analysis to be conducted by the Secretary of Labor in order to assist employers in complying with the Act. The language warns against the "strict application of general prohibitions and provisions" of the ADEA, not its exceptions.

Once again, the legislative history clearly demonstrates that Congress intended to allow employers to make reasonable generalizations about age. Secretary Wirtz stated that the ADEA would permit "administrative distinction between cases where there is good and sufficient reason for adjusting the incidents of a person's employment to his age, and those where there is not that justification." Senate 1967 Hearings, at p. 37 (Statement of Secretary Wirtz); (DOL Report at p. 14.) In fact, Congress assumed that the Department of Labor would join in partnership with employers to establish BFOQ's and other exemptions based upon reasonable factors other than age. There was nothing in the transfer to the EEOC of enforcement of the ADEA which lessened the anticipation of or justification for this partnership. Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978).

Rather than assisting employers in finding a reasonable balance between the rights of older employees and a political subdivision's profound obligation to provide police and fire protection for its citizens, the EEOC chose to be

part of the problem. It refused to issue reasonable guidelines, and maintained that any distinction based upon age was prohibited by the Act, despite the absence of one iota of legislative intent supporting that position. Instead, it noted,

The state and local agencies have only recently been predicating their defense of age limits on the issue of public safety. It appears that they have yet to develop sophisticated statistical defenses that will be necessary to support the age BFOQ's in the protective occupations.

(J.A. 13).

This is a total repudiation of the responsibility which Congress placed first upon the Department of Labor and later transferred to the EEOC. The charge was not to find ways to circumvent the BFOQ defense — not to find legal niceties to deny relief to an employer who legitimately deserved a BFOQ for its employees, but to work with the employer to ensure that its legitimate concerns were protected.

The principal justification for the EEOC's position is that "statistics seem to be available" to support its hypotheses. (J.A. 18; Johnson Br. 36). It is irresponsible and well beyond any legitimate argument based upon legislative history to upset public retirement plans simply because "statistics seem to be available." To serve its own ends, not those sought by Congress, the EEOC has sued nearly one hundred States, counties and municipalities across the Nation for observing employment practices similar or identical to those created by Congress itself. In the State of Indiana alone, the EEOC has filed charges of age discrimination in the law enforcement occupations against more than 60 towns, counties and municipalities in the State. Because the Department of Labor, and the EEOC after it, refused to establish reasonable standards for employers to consider in determining whether their

actions were proper under the Act, the Fourth Circuit was well justified in filling that void by resort to the parallel federal statute.

The meager interpretation provided at 29 C.F.R. 860.102(d)² states that federal statutory and regulatory requirements which require retirement without reference to the individual's actual physical condition when imposed for the safety and the convenience of the public are examples of possible BFOQ's. Petitioners state that the BFOQ³ provision does not even apply to federal employees, as regulation of their rights is only subject to rational scrutiny — why then did the Department of Labor specifically mention Federal statutory requirements unless it recognized the validity of using a statute such as 5 U.S.C. Section 8335(b) as a BFOQ?

While an employer is not permitted to make age distinctions on speculation, nor should it be required to base its employment practices upon it. As the EEOC observes, even its highly partisan statistics only "appear to indicate" that there is a case against mandatory retirement for public safety personnel. Given that proof of the BFOQ is a burden placed upon the employer, if after

² The Interpretative Bulletin issued for the ADEA by the Wage and Labor Standards Division of the Department of Labor provides examples of possible BFOQ's:

"(d) Federal statutory and regulatory requirements which provide compulsory age limitations for hiring or compulsory retirement, without reference to the individual's actual physical condition at the terminal age, when such conditions are clearly imposed for the safety and convenience of the public."

29 C.F.R. Section 860.102.

³ The federal BFOQ was couched in terms nearly identical to the one applicable to other employers:

"The current provision in section 15 (b) which allows the Civil Service Commission to establish maximum age requirements when such as is a bona fide occupational qualification necessary to the performance of [the] job."

(Leg. His. ADEA, p. 371).

the battle of the experts, the EEOC's statistics appear to indicate that a BFOQ is not warranted, and the employer's statistics appear that it is, under EEOC's theory a fact-finder is required to strike down the policy. When Congress exempted hazardous federal occupations from appropriate sections of the ADEA, it did so with the stark recognition that invalidating mandatory retirement provisions for these occupations without proof would be "wholesale error." House Debates, 123 Cong. Rec. 30556 (September 23, 1977) (Remarks of Rep. Spellman); Leg. His. ADEA, p. 415.⁴

In the case of the mandatory retirement provisions at issue, the legislative history of the Fire and Police Employees Retirement System contains sufficient facts *by itself* to warrant a BFOQ. Holding that the Federal government's mandatory retirement policies are reasonable federal standards does not conflict with any requirement that Baltimore's policies have a reasonable basis in fact.

1. THE LEGISLATIVE FACTS SUPPORTING BALTIMORE'S MANDATORY RETIREMENT AGE FOR ITS FIREFIGHTERS.

Baltimore makes retirement mandatory for its public safety personnel at age 55 with certain exceptions. This legislative policy is found in Baltimore City Code (1983), Article 22 Sections 29 *et seq.*, generally known as the "Fire and Police Employees Retirement System" ("F&PERS"). The F&PERS represents the culmination of Baltimore's century of experience in compensating its employees engaged in hazardous employment.

Between 1880 and the early 1920's Baltimore paid for disability and service retirements of its employees on the

⁴ The amendment was offered to avoid the possibility of "wholesale error in dealing with erasing mandatory age requirements . . ." House Debates, 123 Cong. Rec. 30556 (September 23, 1977) (Remarks of Rep. Spellman); (Leg. His. ADEA, p. 415.)

basis of annual appropriations to cover yearly payments. Because a system of appropriations for yearly expenses did not provide the security which is essential to retirement benefits based upon either service or disability, Baltimore planned and adopted the first actuarial retirement system in the State of Maryland, and one of the most advanced plans in the Nation (R. 962).⁵ Prior to establishing the plan, studies prepared to aid the Mayor and City Council showed that employees engaged in the general business of the city could work safely and efficiently until age 70. In the plan that was passed, the "Employees Retirement System" (ERS), Baltimore City Code (1983), Article 22 Sections 1-16, 42-43, Baltimore guarantees its employees the right to work until age 70, and has done so since the inception of the plan in 1926. The Mayor and City Council of Baltimore relied then, as now, upon the legislative process and the collective wisdom of actuaries, experts, and the affected employees to establish its retirement policies. Baltimore's retirement policies have consistently been far-sighted, well-reasoned and humane.

Despite the intense efforts which preceded the ERS, the intervening years between 1926 and the 1950's revealed evidence which led Baltimore's public safety personnel to believe that the ERS did not fit their special needs (R. 763, 956). Firefighters and police officers showed the Mayor and City Council of Baltimore convincing medical evidence that because of their employment, public safety employees were uniquely susceptible to occupational disease of the heart and lungs. Consequently, firefighters were dying before age 60, which was (and is) the earliest elective age for retirement in the ERS. A special committee of Baltimore's city officials was appointed to report to the legislature regarding the deficiencies in the

⁵ The transcript before the District Court is divided into two sequentially numbered volumes, the second of which is designated "Excerpt." Page references are to Volume I, unless designated as R. II.

ERS as it protected public safety personnel (R. 956). As a result of this inquiry, an amendment to the ERS was proposed to accommodate the special needs of Baltimore's public safety personnel and their unions (R. 762). Because of limitations in Baltimore's Charter, the proposed amendment was ruled illegal. Still convinced of the need for enhanced benefits for its firefighters and law enforcement officers, Baltimore sought and obtained special enabling legislation from the State of Maryland. Based upon that authority, Baltimore drafted a bill creating the F&PERS, which bill made transfer into the new system optional (R. 957) for public safety employees in service on July 1, 1962. Baltimore City Code (1983), Article 22 Section 34 (a)(4); (J.A. 3).

Peter J. O'Connor, Chief of the Baltimore City Fire Department, testified before the district court that during the legislative process of the bill, the Baltimore City Firefighters Union lobbied in favor of the bill, which included provisions for mandatory retirement at age 55. In fact, the union provided mortality tables which indicated that on average, firefighters were dying at age 59, which was before the age that a public safety employee would have been eligible for early retirement under the ERS (R. 763). In order to avoid having firefighters die in service, possibly in cases of critical emergency, the F&PERS plan included a mandatory retirement age of 55. The age limit contained in the F&PERS was the result of evidence and statistics provided by Baltimore's firefighters and police officers, the very group which was suffering under the combined effects of occupational disease and an outdated retirement plan (R. 925, 956-7). In short, the mandatory retirement ages in the F&PERS were not arbitrary, but soundly based in fact.

In addition, the General Assembly of Maryland has found as fact that the incidence of heart disease is so great among firefighters that it created a statutory presumption

that "any impairment of the heart or lungs" is causally connected to the firefighter's employment. See, Md. Ann. Code (1956, 1979 Rep. Vol.), Article 101 Section 64A. In order for Baltimore to defeat a workers compensation claim brought by a public safety employee, Baltimore must prove an alternate causation. But since physicians speak of the causation of heart disease only in equivocal terms like "risk factors" and "risk factor analysis," it is impossible to prove any sort of causation — one of the reasons why the General Assembly created the presumption in the first place. Of all the employees in the State of Maryland, only the public safety employees of Baltimore and other political subdivisions are entitled to receive as much as one hundred percent of salary for their disability. *Ibid.*, Section 64A(b). For every other employee in the State, no matter how mangled or battered as the result of an industrial accident, the maximum compensation for total disability is two-thirds of the employee's wages. *Ibid.*, Sections 33(c), 36. For Baltimore's public safety employees, compensation for their disability from heart disease begins at two-thirds of wages, in the form of "Special Disability Retirement," to which is added disability benefits under Maryland's workmen's compensation article. Public safety employees are the only employees in the State of Maryland who are entitled to collect a publicly-funded disability pension in addition to workmen's compensation benefits.

If Baltimore is forbidden to retire its public safety employees before the manifestations of heart disease become ubiquitous in that population, the primary vehicle for compensating older public safety employees will be various combinations of disability payments. In Baltimore's retirement plans, like those of States and municipalities nationwide, disability retirement payments were designed to be the exception; retirement based upon defined and predictable contributions were to be the rule.

Precluding Baltimore from relying upon a reasonable general rule to retire its public safety employees will stand those assumptions, and Baltimore's Fire and Police Employees' Retirement System, on their head. It will seriously undermine confidence in our ability to structure a safe, predictable retirement plan for those who dedicate their lives to working for the Mayor and City Council of Baltimore, and jeopardize the confidence which Baltimore's employees place, along with their contributions, in our retirement systems.

2. *THE LEGISLATIVE FACTS SUPPORTING THE PARALLEL FEDERAL PROVISION.*

It is appalling that EEOC argues that the parallel, federal mandatory retirement ages were the result of Congress's own stereotypes about the aging process, i.e., that our Nation's lawmakers were guilty of arbitrary age discrimination in passing the statute which establishes mandatory retirement for the Nation's firefighters. (EEOC Br. 38-39). One need not be the Director of the Federal Bureau of Investigation to unearth the reasons for Congress's actions:

Testimony during Senate hearings prior to the passage of Public Law 35-350 vividly pointed out the inherent differences between the duties of regular Federal employees and the Federal employees to be covered by the Bill.

* * * * *

The preferential benefits are not to reward these employees for performing demanding services but are designed to satisfy the Government's need for the type of workforce that can effectively perform these services — young and vigorous.

Letter from Director, Federal Bureau of Investigation, to Assistant Attorney General for Administration, United States Department of Justice (Undated), reprinted in *Report to the House Comm. on Post Office and Civil Service*

by the Comptroller General of the United States: *Special Retirement Policy For Federal Law Enforcement and Firefighter Personnel Needs Reevaluation* (Feb. 24, 1977) ("GAO Report"). Appendix VI, p. 76, 80.

Congress determined that law enforcement and firefighting are occupations which are not only hazardous, but which require physical ability and stamina, as well as mental alertness. *Senate Hearings Before the Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service, Retirement for Certain Hazardous Duty Personnel*, 93rd. Cong., 2nd Sess., p. 28 (Statement of Senator Percy). The legislation creating the federal BFOQ for firefighters (S. 3263, the equivalent of H.R. 9281) had as its principal co-sponsor Senator Javits, no stranger to the issue of age discrimination in employment and reasonable non-discriminatory practices. *Ibid.*, p. 26. The intent of the legislation was "to help Federal law enforcement and firefighting agencies maintain a relatively young, vibrant, and effective workforce, both for the safety of the individual, and for the society which they serve."^{6,7,8} *Ibid.*, p. 28. Indeed, the legislative evidence of

⁶ "Two hundred million Americans will receive the benefits [of the provision including mandatory retirement provisions for federal firefighters] because . . . the strength of our society and our cities across the face of this Nation rests on our ability to perform well in the areas of law enforcement and firefighting. Therefore, we are mandated to have young and proficient forces." *Senate Hearings Before the Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service, Retirement for Certain Hazardous Duty Personnel*, 93rd. Cong., 2nd Sess., (Statement of Senator Brasco) p. 136.

⁷ "Inevitably the vast majority of federal firefighters or law enforcement officers who are injured on the job are those in the upper age bracket of the service who are beyond their physical prime. *Ibid.*, (Statement of Senator Dole) p. 105.

⁸ Employee groups, such as the International Association of Firefighters, strongly supported all aspects of H.R. 9281, including the provision for mandatory retirement. The IAFF authority cited an example that because there were no effective

occupational hazards "dramatically illustrated . . . that Federal law enforcement officers and firefighters cannot be casually lumped together with other Federal employees. By the nature of their work, and the risks they face every day, they are different. And different provisions need to be made for them." *Ibid.*, p. 29. The legislative history showed that Congress wanted mandatory retirement for the Nation's firefighters and law enforcement officers, not simply an enticement for older employees to choose to retire.⁹ Quite simply, there was no disharmony between the prohibition of arbitrary age discrimination and the adoption of mandatory retirement for employees engaged in hazardous occupations.¹⁰

According to the Comptroller General, Congress examined the requirements of federal law enforcement and firefighting, and found that many job characteristics of law enforcement officers and firefighters dictated the need for exceptionally vigorous incumbents. These job characteristics included: 1) working long hours under arduous or environmentally adverse conditions; 2) working under significant physical, mental, and emotional stress; 3)

mandatory retirement provisions, public safety was endangered. In his words, the "63 year old firefighter . . . jeopardizes the lives of every man and every person that they are hired to protect and the people who work with them." *Ibid.*, p. 158.

⁹ "These special retirement privileges, enacted as far back as 25 years ago, have been only partially effective in attaining their originally intended purposes [of ensuring a young and vigorous workforce.] Such ineffectiveness might be attributable to . . . the fact that the early retirement option is available only to the employee, with management having no bilateral prerogative to retire, without stigma, one who suffers a loss of proficiency. . . ." *Ibid.*, p. 134.

¹⁰ Senator Bentsen, a sponsor of the legislation to ban age discrimination in federal employment, urged the passage of H.R. 9281 and S. 3263. *Ibid.*, p. 275. He was joined by Senator Eastland (*ibid.*, p. 277), Senator Hruska (*ibid.*, p. 285), Senator Jackson (*ibid.*, p. 288), Senator McClennan (*ibid.*, p. 291), Senator Scott (*ibid.*, p. 294), Senator Talmadge (*ibid.*, p. 297), and Senator Thurmond (*ibid.*, p. 299), among others.

being exposed to hazard during the day-to-day performance of the job; 4) maintaining irregular eating and rest schedules; 5) being absent from home and family for extended periods; 6) being continually on call to respond to emergencies; and 7) having to meet stringent physical demands. In combination, these factors were believed to make it difficult, if not impossible, for older employees to perform at the required pace. GAO Report, p. 23-4.¹¹

See also, GAO Report, Appendix III, p. 45.

Congress continued the mandatory retirement provisions with full knowledge that state and local protective service occupations are even more hazardous than the parallel federal positions. Testimony before Congress demonstrated that "state and local firefighters face *thirteen times* more risk than (certain federal firefighters) do." *Special Retirement Policies as Related to Mandatory Retirement for Law Enforcement Officers, Firefighters and Air Traffic Controllers, Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service, H. Rep., 95th Cong. 2d Sess., 5 October 1978, p. 13.*

The parallel federal provisions reflect a Congressional determination that insofar as possible, the ranks of the Nation's law enforcement officers and firefighters should be composed of the young and vigorous. The Assistant Secretary of the Department of Labor recognized the validity of that point, and told Congress:

To the extent that federal laws provide early mandatory retirement ages, it represents Congressional judgment that after a certain age, the

¹¹ The GAO Report argues that the coverage of the federal policy is too broad, and many positions for covered employees do not require "extraordinary vigor." *Ibid.*, p. 12. "Over half of our sample of 301 program retirees served in administrative and supervisory positions at the time of retirement." GAO Report, p. 12.

specific requirement[s] of the job cannot be met by the older worker. Congress can always review these judgments on the basis of new evidence.

Hearings Before the Subcomm. on Labor of the Senate Subcomm. on Human Resources, 95th Cong., 1st Sess., 1977, p. 338.

The General Accounting Office investigated the breadth of federal mandatory retirement, and concluded that especially vigorous employees could be necessary where lapses in performance significantly and immediately inhibit accomplishment of the agency mission and where the duties of the position require: 1) extraordinary physical stamina and continual mental alertness over long periods or 2) frequent short-term extraordinary physical exertion under environmentally adverse conditions. "These criteria could encompass, for example, the duties of an individual frequently required to . . . fight . . . structural fires. In such situations, lapses could result in immediate negative consequences." GAO Report, p. 25.

The Appendix to the report includes the views of the agencies surveyed by the GAO. Not a single Federal agency recommended abolishing the mandatory retirement provisions for its employees. Even the United States Civil Service Commission disagreed with the extent to which the GAO Report was critical of mandatory retirement policies. GAO Report, Appendix II, p. 31. The Department of the Treasury (Appendix III, p. 33), the United States Customs Service (Appendix III, p. 47), the Internal Revenue Service (Appendix III, p. 50), the United States Department of Agriculture (Appendix IV, p. 62), the Postmaster General (Appendix V, p. 70), the United States Department of Justice (Appendix VI, p. 73), the Director of the Federal Bureau of Investigation (Appendix VI, p. 76), the Drug Enforcement Administration (Appendix VI, p. 91) (which thought that the major omissions in the GAO Report suggested a "preconceived conclusion"),

the Immigration and Naturalization Service (Appendix VI, p. 99), all blasted the conclusions of the report. Given that the federal mandatory retirement policies remain unchanged, the GAO must be viewed as the "dissent," and the views of the agencies, the "majority opinion." *Ibid.*, Appendix VI, p. 73, Appendix III, p. 61, Appendix III, p. 41, Appendix VI, p. 87.

It is incorrect to say that the legislative facts adopted by Congress to justify the need for the ADEA in 1967, or the facts before it in formulating the mandatory retirement of federal public safety personnel are in conflict from those found by the Mayor and City Council of Baltimore in 1962.¹² If that were the case here, then local concern might very well yield to the National interest, as that interest has been established by Congress. But such is not the case. Both legislatures determined that, "Generally, a person in his fifties or sixties can not retain the strength and stamina required to perform law enforcement and firefighting activities except in a supervisory capacity." *Ibid.*, Appendix III, p. 43. The legislative facts upon which the F&PERS and the parallel Federal statute were based are a refinement of the general interests protected by Congress. The legislative history supporting the ADEA's broad proscription of age discrimination is the general

¹² According to the DOL Report, subsequent legislative history, specifically as it is found with respect to the BFOQ provision, should be accorded little weight. DOL Study, p. 7, citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.39. (1977). In any event, the legislative history of proposed amendments also contains specific concerns of Congress that the ADEA not a "straight-jacket on endeavors which have a safety involvement" (Senate 1967 Hearings, 103-4), such as firefighting, which has "very strict physical requirements upon which the public safety depends." H.R. Rep. No. 95-527, 95th Cong., 1st Sess. (1977), p. 12. See also, 123 Cong. Rec. 34319 (1977) (remarks of Sen. Javits). There is not a shred of subsequent history which suggests that Congress intended to back down from the protection of legitimate public safety concerns of employers.

rule: the BFOQ, as it is found in the ADEA and as it exists in the F&PERS, reflects the exception to that rule.

a. Criticism of Federal Practices Is Irrelevant to Baltimore's Retirement Ordinance.

By suggesting that other federal agencies have criticized the Congressional policy embodied in 5 U.S.C. 8335(b), petitioners attempt to lessen the force of the requirement that federal firefighters retire mandatorily at age 55. But when such criticism is examined, it clearly bears no relation to the facts of this case.

That the Congress may desire, as a matter of policy, to achieve this result through the enhancement of optional retirement for its employees does not diminish the public safety considerations supporting its requirement of youth and vigor for employees in public safety occupations. The overbreadth of Congressional policy does not lessen Baltimore's justification for its own properly defined policies.¹³ Furthermore, despite a finding that the general

¹³ The EEOC relies heavily on the report entitled *The Myths and Realities of Age Limits for Law Enforcement and Firefighting Personnel*. (EEOC Br. p. 41, n.31). This report, prepared for the House Select Comm. on Aging, was based largely upon a literature survey done at the committee's request, and which literature survey appears as Appendix II to the Committee Report. The "Myth" associated with the mandatory retirement of firefighters is that medical science knows enough about the subject to warrant the elimination of mandatory retirement ages. The "Reality" is that medical science does not now know how to avoid the use of mandatory retirement ages in connection with preserving the health of firefighters. The report acknowledges that it is "but a first step in an area that needs much more work. At present only limited empirical data are available." Apx. II, p. 39. As distinguished from law enforcement, firefighting involves "Long periods of relative inactivity [which are] interspersed with sudden bursts of great responsibility which involve handling heavy equipment, sometimes for long periods, often in extreme heat, and sometimes, because of the greater incidence of house fires in wintertime, in extreme cold. The firefighter's rescue activities have the added pressures of urgency." Appendix II. p. 46.

scope of federal special retirement policies was too broad, there were no recommendations that federal firefighters charged with protecting an urban population or industrial area be exempted from mandatory retirement.

In agencies such as the Baltimore City Fire Department, there is precious little room for those who are not fully capable of performing fire combat. The F&PERS is an expensive system to fund per dollar or payroll compensation, and the history of both the fire and police departments in the last two decades has been the "civilization" of both departments. In short, there are a fixed number of uniformed positions for firefighters and officers available to Baltimore, and bringing one "indoors" means that a post will not be manned, a truck will operate with less than a full complement of firefighters, or that the remaining few will pick up the extra weight. None of these alternatives is acceptable to the Mayor and City Council of Baltimore, or its citizens.

- b. *That the Parallel Federal Provisions Permits Continued Work Beyond the Statutory Age of Retirement Has No Relevance to this Case.*

The EEOC contends that because agencies, under undefined conditions and for unspecified purposes, may allow employees subject to a statutory mandatory retirement age to work beyond the mandatory retirement age that Baltimore's practices are objectionable, and those of the Federal government are not. Where the mission is strictly law enforcement or firefighting, agencies have established as policy that their need for a youthful and vigorous workforce will not allow resort to this provision. For example:

The Customs Service, in support of the youthful, vigorous workforce concept, has established the policy that there will be no requests for exception of the mandatory retirement age forwarded to the [Treasury] Department as provided for in the legislation.

GAO Report, Appendix III, p. 48. To the extent that the provision allowing federal employees to work beyond the statutory age of retirement have been examined in court, the evidence shows that the agencies permit no one to work beyond the age of mandatory retirement.¹⁴

II. BALTIMORE PROVED THAT ITS MANDATORY RETIREMENT PRACTICES WERE SUPPORTED BY THE EVIDENCE.

A. *The District Court Imposed an Improper, Unreasonable And Erroneous Burden Upon Baltimore.*

The District Court relied upon the test created in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), to strike down the mandatory retirement provisions for Baltimore's firefighters. In the *Tamiami* case, the Fifth Circuit opined that an employer who prima facie violates the ADEA must prove two elements to satisfy the BFOQ defense of Section 4(f)(1) of the Act: first, that the job qualifications which the employer invokes to justify its differentiations are reasonably necessary to the essence of its business, and; second, that either all or substantially all persons above the selected age are unable to meet the employer's standards, or there is no practical way to differentiate qualified from unqualified employees over the age limit. *Ibid.* This "two-prong" test is strictly a creature of the judiciary which eviscerates the BFOQ exception.

In this Court's opinion in *E.E.O.C. v. Wyoming*, *supra*, the BFOQ exception was stated only in terms of the statutory definition. The Court's opinion never referred to

¹⁴ The provisions requiring mandatory retirement of federal employees are enforced without exception, and the option to continue employees, such as U.S. Marshalls or F.B.I. agents, in employment beyond age 55 is uniformly disregarded. See, e.g., *Heiar v. Crawford County*, 746 F.2d 1190 (7th Cir. 1984), Brief of Defendant-Appellant, p. 36-37 (citing findings of fact made by the district court based upon testimony of retired U.S. Marshalls and F.B.I. agents.)

or adopted the *Tamiami* test. Baltimore asserts that the *Tamiami* test unjustifiably and artificially imposes a more severe burden on an employer than the BFOQ exemption was ever intended to require. Because it has no basis in the contemporary legislative history of the ADEA, the *Tamiami* test must be rejected in favor of a test more in keeping with Congress' prohibition of arbitrary discrimination in employment.

In *Usery v. Tamiami*, *supra*, the Fifth Circuit explained that each "prong" of the test it had created was derived from sex discrimination cases decided under Title VII. In *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971), the Fifth Circuit rejected Pan American's policy of refusing to hire male cabin attendants, which policy was based on the theory that males could not cater to the psychological needs of its passengers as well as females could. The Court stated that discrimination based on sex is valid only when the essence of the business would be undermined by not hiring members of one sex. *Diaz*, *supra*, p. 388.

The second prong of this test was also derived from a sex discrimination case. In *Weeks v. Southern Bell Telephone and Telegraph Company*, 408 F.2d 228 (5th Cir. 1969) the Court held that the employer's refusal to hire women for a job that would occasionally require them to lift objects weighing thirty pounds violated Title VII. *Weeks*, *supra*, at p. 235, 236. The Court stated that to rely on the Title VII bona fide occupation qualification exception, an employer must prove it has a factual basis for believing that all or substantially all women would be unable to perform safely and efficiently. *Weeks*, *supra*, p. 235. That standard comprises only half of the second prong of the *Tamiami* test. The other half, "that there is no practical way to differentiate qualified from unqualified applicants," was derived from a footnote in the *Weeks* case. *Weeks*, *supra*, p. 255, n.5.

These standards are doubtless appropriate in a sex discrimination case where the ability to perform simple tasks is readily determined, and where failure to perform the job has no public safety implications. But there are important reasons why extending these standards to define the BFOQ exemption of the ADEA is unwarranted, unworkable and unjustified.

First, classifications based on sex have enjoyed considerably more constitutional protection than have age classifications. Falling just short of a "suspect" class, women have been characterized by this Court as having suffered a "... long and unfortunate history of sex discrimination," and still facing "... pervasive ... discrimination in our educational institutions, in the job market, and ... in the political arena." *Frontiero v. Richardson*, 411 U.S. 677 (1973). In sharp contrast, the aged, and specifically the class composed of highway patrolman over 50, has been clearly denied "suspect" status by this Court, which stated:

[A] suspect class is "saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated such a position of political powerlessness as to command extra ordinary protection from the majoritarian political process." While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons ... have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. ... [O]ld age does not define a "discrete and insular" group [citation omitted], in need of "extraordinary protection from the majoritarian process." Instead, it marks a stage that each of us will reach if we live out our normal span.

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313, 314 (1976).

In the *Tarniami* case, the Fifth Circuit applied an oppressively strict standard, taken wholecloth from the highly protected realm of sex discrimination, to a class which patently warranted a lower level of constitutional protection. There is no contemporaneous¹⁷ legislative history which warrants such an elevation of the scrutiny to which an employer's decisions are to be examined under the BFOQ test. Application of a standard derived from race or sex discrimination to age discrimination is as "easy and wrong" today as when the Secretary of Labor first wrote those words. See, *supra*, p. 7.

In the *Murgia* case, this Court upheld a statutory mandatory retirement age of 50 for the Massachusetts State Police. The statute had been challenged on the basis that it denied equal protection under the Fourteenth Amendment. This Court examined the Massachusetts mandatory retirement provision by applying a rational basis standard to the State's legislative determination. The opinion cited the testimony of the State's medical experts, who testified to the physiological and psychological demands of police functions, the relationship between aging and the capacity to handle stress the risk of physical failure — especially cardiovascular — that increases with age and the inability to perform stress functions that increases with age. *Ibid.*, at p. 311.

Similarly, in *Vance v. Bradley*, 440 U.S. 93 (1979), this Court upheld the mandatory retirement for foreign service personnel at age 60 against a challenge brought under the Equal Protection Clause of the Fifth Amendment. Again, this Court applied a rational basis standard to the employer's practices, and found that the retirement age was rationally related to furthering a legitimate state interest, in that it assured the competence and reliability of foreign servants in critical positions, created predictable promotion opportunities, and removed older employees less equipped to face the rigors of overseas duty. *Id.*, at 97.

The application of the *Tamiami* test to the ADEA's BFOQ exception has the effect of amending the statutory defense given to employers. The application of the BFOQ exemption here and in the District Court's opinion in *E.E.O.C. v. Missouri Highway Patrol*, 555 F. Supp. 97 (W.D. Mo. 1982), *rev'd*, 748 F.2d 447 (8th Cir. 1984) case demonstrates that an employer will prevail only if its practices pass what is tantamount to a strict scrutiny test. The various courts considering the BFOQ exemption including the District Court in the present case interpret the BFOQ exemption in a way that improperly vaults age into the highest degree of constitutional protection.

In the Chief Justice's dissent in the *Wyoming* case the decision of the District Court in this case was cited as a warning that rigid application of the strict scrutiny test found in *Tamiami* will cause extreme hardship to all political subdivisions. Given the state of modern medicine, it is particularly difficult for the employer to meet the second prong of the *Tamiami* test. Medical experts can always be found who are willing to argue that tests exist to determine which employees are able to perform a job and which cannot, irrespective of age. There are persons engaged in administering various physiological and medical tests for profit, such as petitioners' witness (Paul Davis, Ph.D.) (R. 32). It should come as no surprise that those who have an unabashed financial interest in selling their services make extraordinary claims for the ability of their tests. It is also not surprising that little hard evidence, i.e., articles accepted for publication by well-respected, refereed journals, is cited by these advocates. The practical effect of this 'second prong' is that it virtually ensures an employer's defeat in these cases if a plaintiff can find anyone at all to say that not all persons above the mandatory retirement age cannot perform the job or that there exist tests capable of differentiating between qualified and unqualified employees without regard to age.

Finally, the *Tamiami* test finds no support in the legislative history of the ADEA. As set forth above, the studies and congressional debate which preceded passage of the Act in 1967 clearly and unequivocally demonstrates Congress' desire to protect the legitimate and rationally based judgment made by employers. There is not one iota of legislative history which supports an inference that Congress intended to elevate age-based distinctions into the strict-scrutiny arena.

B. BALTIMORE DEMONSTRATED THAT ITS MANDATORY RETIREMENT OF FIREFIGHTERS WAS PREDICATED UPON A BONA FIDE OCCUPATIONAL QUALIFICATION REASONABLY NECESSARY TO THE NORMAL OPERATION OF THE BALTIMORE CITY FIRE DEPARTMENT.

Assuming that this Court is satisfied that the legitimate interests of employers are adequately protected by the *Tamiami* test, Baltimore urges this Court to examine closely the process by which that test is applied generally by courts, and specifically as it was applied in this case.

Baltimore sought review of the District Court's opinion with *E.E.O.C. v. Wyoming, supra*, in order to advance the argument that the prevailing judicial analysis of the BFOQ defense was woefully deficient, both in terms of protecting its sphere of sovereignty and as a matter of basic statutory construction. To a certain extent, judicial analysis has matured after this Court's opinion in *Wyoming*, even though no specific guidelines were provided regarding the application of the BFOQ defense, but the test does not protect the legitimate concerns of the Nation's State and local governments. We repeat what has been the essence of our case from the very beginning: *If firefighting in Baltimore's metropolitan area does not warrant a reasonable BFOQ under the ADEA, then the BFOQ exception does not exist.*

One error made by the District Court below, as well as the District Court in the case of *E.E.O.C. v. Missouri, supra*, is the failure to afford the political subdivision even the meager protection of the first element of the *Tamiami* test. That element, a determination whether the subject practice is reasonably necessary to the essence of the employer's business, is largely discarded in the analysis of BFOQ's for firefighting and law enforcement. It is tautological that the essence of the Baltimore City Fire Department is fighting fires. Because there is no "business" per se, courts gloss over the element of the *Tamiami* test derived from the *Diaz* case. This is no minor transgression, because:

It is the *Diaz* element of the BFOQ defense where the third-party safety factor comes into play. *Diaz* mandates that the job qualifications which the employer invokes to justify his discrimination must be reasonably necessary to the essence of his business. . . . The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications. . . .

Usery v. Tamiami Trail Tours, supra, pp. 235-6.

The *Tamiami* court intended that the "reasonably necessary limitation" upon age distinctions would permit courts to weigh the effect upon public safety of removing a legitimate age classification. Even under the strict *Tamiami* test, the first element requires consideration of the potential for harm in abrogating safety standards for protective service personnel. Age differentiations which would be "unreasonable" if applied where disruption of an employee's performance entailed little risk of harm might be the very essence of good judgment where such disruption would be catastrophic.

The factual findings made by the District Court establish that firefighters are at higher risk for heart

disease — already established as the Nation's number one killer — than the average population. "Plaintiffs' expert witnesses . . . readily concede that firefighters *as a class* are particularly subject to heart disease and that *the risk of heart disease increases with age*." 515 F. Supp., p. 1298. A court should have no business undermining legitimate, factual, concerns for public safety because it believes there may be a better way.

When Congress amended the portion of the ADEA which applies to the Federal government, it expressed the intent to make the Federal Government "take the lead in eliminating mandatory retirement from the Federal service." 123 Cong. Rec. 29010 (September 13, 1977); Leg. His. ADEA, p. 407. Congress set the Federal service up as a benchmark, against which the Courts could measure the conduct of other employers. Indeed, Congress placed significantly greater burdens upon the Federal service than were placed upon employers in general. Those substantive differences listed by the EEOC (EEOC Br. 33), such as the grant of a *bona fide* executive exemption to employers other than the Federal service, and the age limit of 70 for protection under the ADEA for employees other than those in the Federal service, are in complete harmony with Congress' attempt to make itself the model employer for the Nation.

Congress did not express the intention, nor does it have the authority, to impose strict or middle tier scrutiny upon the retirement practices of other employers, while reserving the right unto itself to act practically without restraint. *McGowan v. Maryland*, 366 U.S. 420 (1961) (Statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.) There is nothing unconstitutional about tailoring local statutes to meet local needs, *United States v. Sharpnack*, 355 U.S. 286, 294 (1958). But when Congress enacts National legislation, the situation is fundamentally different. "If one small group is excluded from the operational effect of

the statute, the rationality of that exclusion is highly suspect." *D.C. Federation of Civic Associations, Inc. v. Volpe*, 434 F.2d 436, 439 (U.S. App. D.C. 1970), cited in *United States v. Thompson*, 452 F.2d 133 (U.S. App. D.C. 1971). The argument that federal employment is judged by a rational basis test, while non-Federal employment is judged by a middle tier or strict scrutiny test is a discrimination against people. "[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation. . . . Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation." *Railway Express Agency v. New York*, 336 U.S. 196 (1949) (Jackson, J., concurring) cited in *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972). The assertion that the ADEA imposes a heightened level of scrutiny only for non-Federal employment leads ineluctably to the irrationality of the Act itself. On the other hand, the argument that the ADEA was Congress' means of extending traditional equal protection to private contracts of employment by reliance upon its Commerce Clause power, harmonizes the ADEA with this Court's holdings in the area of age discrimination, the "right" to employment, Federal retirement practices, and those of Baltimore as well.

1. *All or substantially all Firefighters Over the Mandatory Retirement Age Cannot Safely And Efficiently Function as Firefighters.*

Firefighting is the most difficult, dangerous and deadly job in the Nation. According to petitioners, firefighting has more on-duty deaths per capita than any other occupation in the Nation. (R. 330)¹ (Def. Ex. 15, p. 10; R. 322; R. 322). The leading cause of death and disability among firefighters is heart disease (R. 338), the incidence of which increases dramatically with age (R. 394). The most common cause of death in the age group 50-55 is

heart attack (R. 912), and firefighters, as an occupational group, suffer from heart disease at twice the National rate (R. 489). Sudden heart attack causes 44.4% of the on-duty deaths in firefighting (R. 695).

The firefighter's working environment is characterized by a lack of oxygen (R. 388), and extreme ranges of temperature (up to 450 degrees F. (Def. Ex. 15, p. 14; R. 322; R. 322)) and humidity (R. 377-94). These factors tax the heart's ability to function, perhaps by as much as 50% (R. 387). The fire scene always exposes a firefighter to carbon monoxide, a potentially lethal poison which kills by robbing the body of the ability to get oxygen to the heart. Only very strict use of respirators eliminates this danger, because a firefighter is most likely to take off his respirator when the danger from carbon monoxide is greatest (R. 383). Added to the physical stressors is the requirement that firefighters be prepared to save the lives of fire victims.

Petitioners' expert described firefighting as follows: "In setting up to fight the fire, firemen, protectively clothed in boots, heavy coat and helmet, hook up to hydrants, raise ladders and stretch hoselines up fire escapes, interior stairs of the building and up aerial ladders. On occasion, scaling ladders, which consist of a metal and wood beam with a hook at the top and crossbars for climbing, are used to allow individual firemen to go up the outside of a building, floor by floor. In fighting the fire, firemen advance charged hoselines. They use axes for forcible entries, axes or power saws to cut holes in roofs or in floors above the fire for ventilation, and halligan tools and hooks to pull down ceilings and pull up floor boards to locate pockets of fire." (R. 331-3); (Def. Ex. 15, p. 1-2; R. 322; R. 322).

"Speed, with safety, is important where there is the potential of people in danger. Lifesaving is sometimes accomplished from aerial, portable or scaling ladders and

becomes more difficult under extreme conditions such as rain, ice and wind. In some instances, firemen are lowered in a rope harness to rescue people at windows, then pulled back up by other firemen. During fire and rescue operations, firemen often work in adverse conditions of heat, limited or, in some cases, near zero visibility because of smoke and other circumstances and sometimes, in the presence of noxious fumes. If environmental conditions are severe, firemen Don Scott Air Paks which weight about 30 pounds and use compressed air. With this additional weight, firemen still perform their assigned duties. Endurance or stamina, the ability to perform work over time, becomes especially important when working at a fire scene which often makes breathing difficult, and saps a firemen's energy." (R. 333-4).

According to petitioners' witness: "Age limits performance, intimating that the older firefighters are working at a higher percentage of their functional work capacity." (Def. Ex. 15, Abstract, p. 2; R. 322; R. 322). "The successful completion of firefighting tasks requires a physical performance profile reflecting *youth*, high aerobic capacity, high muscular strength and endurance, above average lean body weight and minimal body fat." (Def. Ex. 15, Abstract, p. 3, emphasis added; R. 322; R. 322).

According to petitioners' expert's study, the fitness of firefighters is that of the average male. Some of the firefighters in the study, who were all active duty firefighters with the *Federal* government, showed evidence of Coronary Artery Disease (Def. Ex. 15, p. 10, emphasis added; R. 322; R. 322). Petitioners' expert's review of the literature revealed: "Cardiovascular responses to sudden strenuous exercise without warm-up were studied in 44 males ages 21 to 52. Thirty-one (70%) of these men had abnormal EKG changes, including ischemic, T wave, and ectopic beat changes. In another study, . . . increases in heart rate after the sounding of the alarm were 47 beats/minute (BPM) mean value, with ranges of 12 to 117

BPM. Approximately one minute after the alarm, rates were still elevated an average of 30 BPM. *Performing the same activities in a simulated condition failed to produce the same results.*" (Def. Ex. 15, pp. 11-12; emphasis added; R. 322; R. 322). "Data gathered during live firefighting produced even more startling results. Two subjects, 3.5 minutes after the sounding of the alarm and arriving on the scene, had heart rates of 150 BPM. For over 90 minutes of consecutive firefighting, the heart rate of one firefighter was maintained at 160 BPM or greater. *There does not seem to be a discernible difference in the heart rate response pattern between experienced versus inexperienced firemen.* Heart rates would rise even when knowing that the probability of a false alarm was great." (Def. Ex. 15, p. 12; emphasis added; R. 322; R. 322).

The City of Baltimore has a population of 785,000 and consists of an area of 91.93 square miles, of which 78.82 square miles are land. Baltimore has a waterfront of 46 miles of which 39 miles are developed. Fire prevention and suppression are provided by fifty-two engine companies (including fireboats), twenty-nine truck companies, one heavy duty rescue wagon, sixteen medical units, and numerous special vehicles. The department is staffed by 2,195 personnel (R. 824). Between July 1, 1980 and June 30, 1981, the department responded to a total of 120,225 emergency alarms. Within the City's borders are 5,000 vacant buildings, 14 hospitals, 40 nursing homes, 14 domiciliary homes, 10 underground parking lots, 1,507 high-rise buildings, 301 schools, 6 subway stations, 2 correctional institutions and 31 bulk oil facilities, "running the gamut of fire hazards." (R. 861-863). According to the Chief of the Baltimore City Fire Department "the rigors of firefighting in Baltimore are as great as probably any city in the country." (R. 862).

The District Court was presented with evidence from all sides that the capacity for physical work declines linearly and inexorably with age (R. 371, 592, 907). The ability to

perform physical labor is the sum of aerobic capacity, or the body's oxygen-using ability, and anaerobic capacity, which uses the body's stored chemical energy. Since resort to anaerobic capacity is very inefficient and creates an oxygen debt which the body must repay, the anaerobic component of an individual's work ability is discarded.

Aerobic capacity is measured both in terms of the total amount of oxygen transported to muscle tissue per minute, and in terms related to body weight (R. 355). The first measurement, absolute aerobic capacity, is expressed as liters of oxygen used by the body per minute (l/min). The more oxygen which is transferred to muscle tissue by efficient operation of the heart and lungs, the more work can be done. Absolute aerobic capacity is essentially a measure of how much work the body can perform, akin to a measurement of how far a car can go before refueling. The second measurement, relative or weight-based aerobic capacity, is also important to firefighting. Weight-based aerobic capacity is measured in milligrams of oxygen per kilogram of body weight, per minute (ml/kg-min). Weight-based aerobic capacity is essentially a measurement of how efficiently an organism uses oxygen, similar to a car's miles-per-gallon rating.

The differences between what these measurements represent is important. A very small individual might not be able to muster the absolute aerobic capacity required to perform arduous labor, no matter how well-conditioned he or she was, i.e. no matter how high was his or her weight-based aerobic capacity (R. 612-16). Evidence proved that firefighters often work at or near their maximum capacity (R. 591.)

The EEOC's witness, who had no special knowledge of the requirements of firefighting (R. 621), testified that it would be reasonable for an employer to set a minimum requirement of 3.0 l/min absolute aerobic capacity for firefighters, although personally he preferred 2.5 l/min.

(R. 623). The figure of 2.5 l/min is a dangerously low standard, since according to another of plaintiff's witnesses, a group of firefighters whose fitness was measured and determined to unacceptably low had a calculated mean absolute aerobic capacity of 3.27 l/min.¹⁵

The plaintiffs' evidence proved that merely wearing the 52 pounds of protective gear required for fire combat consumed nearly one-third of a firefighter's strength (R. 286), and raised his heart rate 27% (R. 340). A firefighter often works at 60%-80% of his maximum aerobic capacity while in fire combat (R. 591), and the requirement for immediate response and inherently dangerous working conditions makes fire combat one of the most perilous occupations in the Nation.

All experts expressing opinions testified that firefighters are, on average, no better conditioned than the average sedentary population. That is, conclusions from longitudinal studies of the fitness of the average population can be legitimately applied to firefighters of similar age (R. II 28).

¹⁵ Plaintiff's witness Davis measured the aerobic capacity of a group of firefighters, and then rated individual performance. There was, according to the plaintiff's own evidence, a perfect inverse correlation of work ability with age. Thus, the mean age of the "Excellent" group was 28, the "Good" group was 29.3, the "Average" group 31.4, the "Fair" group 37.9, and the "Poor" group, 46.1 years of age (R. 356). Regarding even the "Fair" group, plaintiffs' expert conceded that he would "certainly not look to those individuals with the same degree of security that I would with the individuals in the [excellent] group." (T. 358).

If the "Poor" group alone is analyzed, members are found to exhibit an absolute aerobic capacity of 3.2 l/min, making a minimum of 2.5 l/min very low indeed. The group possesses a mean weight-based aerobic capacity of 34.9 ml/kg-min, and an average body weight of 206.1 lbs, or 93.7 kg. Multiplying 93.7 kg (mean body weight) times 34.9 ml/kg-min (relative aerobic capacity) yields 3,270 ml/min absolute aerobic capacity. Expressed in standard units, this equals 3.27 l/min aerobic capacity (R. 616-618).

In point of fact, there are very few firefighters over the age of fifty-five across the Nation. Despite Dr. Davis' extensive testing experience, he had never tested a single firefighter over the age of 65, the age to which the District Court permitted the plaintiffs to work! (R. 309). In the Washington metropolitan area departments, of a total 3,050 firefighters, there were only 11 (0.36%) firefighters between the ages of 55 and 69, and only 1 (0.03%) above the age of 60 (R. 352). According to the plaintiffs' evidence, this age distribution was not unusual (R. 326). Montgomery County, Maryland, a locale which Davis consults, had only 1 employee in the fire service over age 55, and he was a fire officer (R. 369). In the Davis study, there was only 1 individual — from a group of more than 100 active firefighters — over the age of 55 who was subjected to any physiological study (R. 327), and none over the age of 60! (R. 328).

Dr. Lind provided testimony that at age 60, an individual's maximum aerobic capacity (variously VO_{2max} , MVO_2 , or VO_2Max) is reduced 30% from its peak value, which is usually achieved at about age 20 (R. II 25). According to *The Human Energy Costs of Firefighting*, as actually measured by researchers, at age 60 a male firefighter would be called upon to exceed his aerobic capacity very quickly (R. 376-9). At the levels of exertion actually required by firefighting, younger men could work for an hour or more, while those above age 60 could only last for a few minutes (R. II 39-40).

Evidence provided by the petitioners proved that all or substantially all firefighters over the age of 55 could not meet a reasonable standard. Petitioners' witness, Dr. Buskirk, provided evidence derived from his measurements of the aerobic capacity of the members of a volunteer firefighting company (R. 625-30). Petitioners' data show a level of performance for the firefighters well below values derived from measurements of the average sedentary population. According to petitioners' own mea-

surements, firefighters weighing 80 kg would fail to exhibit a reasonable maximum aerobic capacity at an age slightly greater than 35.¹⁶

According to respondents' evidence, if the measurements made by Buskirk and published in the professional literature are analyzed in relation to age (R. II 24), no one above the age of 50 will be able to achieve a maximum aerobic capacity of 3.0 l/min (R. II 36); (Def. Ex. 8h; R. II 36; R. II 36), a level admitted by the petitioners' witness Buskirk to be a "reasonable standard." Even the well-conditioned 55 year old will not reach that reasonable minimum standard, and if that individual is a firefighter, his performance will be unsafe. It will only be a "very, very rare" individual between 50 and 55 who will demonstrate a weight-based aerobic capacity of 40 ml/kg-min., a reasonable standard (R. 925-6).

In practical terms, even petitioners' witnesses concede that firefighters rarely work in fire combat beyond the age of 55. When they do so and survive, it may very well be because their younger counterparts "look out" for the older firefighters, as they do in Baltimore, or they gravitate to less physically demanding positions (R. 795-6). In technical terms, the application of a reasonable standard of aerobic capacity would eliminate all or practically all persons over the age of 55 from fire combat.

¹⁶ If 3.0 l/min is, as Dr. Buskirk admits, a reasonable job requirement, then 80 kg (176 lbs.) firefighters must possess a weight-based aerobic capacity of 37.5 ml/kg-min to satisfy that reasonable standard. 37.5 ml/kg-min times 80 kg yields an absolute aerobic capacity of 3,000 ml/min or 3.0 l/min. The point at which the Alpha volunteer firefighters exhibit a weight-based aerobic capacity is just beyond age 35! Even taking into account the error flags on Buskirk's graph, not a single subject beyond the age of 55 tested by this petitioners' expert was able to achieve the 37.5 ml/kg-min weight-based aerobic capacity required to produce 3.0 liters of absolute oxygen transport A. 3 (Def. Ex. 17-A; R. 623; R. 637).

2. *It is Impractical or Impossible to Test for Cardiovascular Health for Public Safety Employees.*

Petitioners' evidence established that heart disease was the number one killer in the Nation. For the form of heart disease known as atherosclerotic cardiovascular disease (ASCVD), the first symptom in one-half of the cases is sudden death or myocardial infarction (R. 913). Firefighters have at least double the average population's rate for sudden cardiac death, myocardial infarction and angina pectoris (R. 489). Petitioners' evidence incorporated to the *International Firefighters Mortality Report* (1976), which establishes heart disease as to be the leading cause of death and disability for firefighters. (R. 337-8); (Def. Ex. 15, pp. 10-14; R. 322; R. 323).

Petitioners' witness admitted that 50% coronary artery occlusions are frequently found in males aged 55, and that a 50% coronary occlusion could not be ruled out by a negative exercise stress test (R. 531). A firefighter with a 50% occlusion would cause that witness concern, because the firefighter would have gone beyond the threshold of compromise to the circulatory system, unless he "shepherded" his energy. But to place this firefighter suddenly in an emergency situation is a "major hazard — [a] challenge to the organism's capabilities." (R. 537). In other words, a firefighter so situated might die.

The extent to which cardiac health can be measured is one of the great medical controversies of our day.¹⁷ The

¹⁷ The type of testing advocated by Dr. Fox, and adopted by the District Court, follows an experiment conducted by Dr. Robert A. Bruce entitled *Value of Maximal Exercise Tests in Risk Assessment of Primary Coronary Disease Events in Healthy Men: Five Years' Experience of the Seattle Heart Watch Study*, and published in the *American Journal of Cardiology*, at Vol. 46, p. 371 (Sept. 1980). Data presented to the District Court were derived substantially from that research. (A. 2), (Pl. Ex. 24(i); R. 440; R. 603); (A. 1), (Pl. Ex. 24(e); R. 440; R. 603). Bruce's article clearly demonstrates the enormous increase in primary cardiac events after age 55, and indeed, the top part of

literature on the practical worth of cardiovascular testing has varied greatly in the past two decades. In the early days of electrocardiography, wild claims were made for the predicative and diagnostic value of the resting EKG and the simple Masters Step Test. Recent studies indicate that

the graph shows that age less than 55, as opposed to age 55 and greater, is a statistically significant predictor of primary cardiac events to the 0.05 level of probability, considered significant by scientific researchers (A. 1); (R. 919). If Baltimore applied Bruce's experiment ($n = 2365$) to its firefighters ($n = 2195$), it would conduct as many as 2,195 Exercise Stress Tests to retire about 1.1% of the population of firefighters determined by this experiment to be significantly at risk. (R. 921). According to Bruce's data, 2,365 persons are likely to experience about 8 primary cardiac events which would be eliminated by the experiment ($2,365$ (the number of subjects) times 1.1% (the percentage of tested subjects who would be in Group 3, the unhealthy or high risk group)) times .33 (the rate at which the unhealthy or high risk group experiences primary cardiac events over a five year period) = 8). However, the vast bulk of subjects, or firefighters, would continue to experience primary cardiac events at least at the rate demonstrated in A. 1. The healthy group cleared by the experiment consists of 1) those who had no traditional risk factors, and for whom Exercise Stress Testing was of no predictive value, amounting to 41% of the population, and 2) those who had any risk factor, such as smoking, high blood pressure, family history of heart disease, glucose intolerance, or elevated levels of cholesterol, but two or fewer Exercise Risk Predictors showing up on the stress test, amounting to 58% of the population. Over the 5 years of the study, Group 1 had 10 primary cardiac events (0.01 (the five year probability) times 980 (the number in the group)), while Group 2 had 20 (0.015 (the five year probability) times 1,367 (the number in the group)). These groups would be retained in the fire service by the experiment. Group 3, the group retired as unhealthy, had 8 primary events (0.33 (the five year probability) times 25 (the number in the group)). Thus the healthy groups cleared for work by this experiment had nearly four times the number of primary cardiac events (30) as the unhealthy group (8), plus, 17 of those 25 firefighters retired under this experiment might have been healthy enough to continue working. In sum, this experiment, which has been done only once, purports to tell us a great deal about a miniscule segment of the general population. Requiring Baltimore to make medical judgments upon this experimental paradigm is like requiring

these claims were false: The origins of atherosclerotic cardiovascular disease remain obscure. Experts do not know what causes the disease, but they think they know what is found in association with it. The most important thing associated with ASCVD is advanced age: Of attributes which have been measured, the only statistically significant predictor of coronary health measured is age less than 55 versus age 55 or older (R. 919, 927).

As an example of just how controversial the assessment of cardiac health is, the Report of the Council of Scientific Affairs of the American Medical Association issued a report which stated:

"[R]ecently, however, have data become available which allow comparison of coronary arteriography with the results of exercise testing in substantial numbers of asymptomatic subjects. This has shown a disturbingly high prevalence of both false positive and false negative tests so that the value of such testing has recently been challenged.

* * * * *

[Exercise Stress Testing] probably has little indication in the routine screening of the healthy

firefighters to drive their emergency vehicles by looking through a microscope. Considering that responsible medical opinion is split on the value of maximal Exercise Stress Testing, it is an outrage to require Baltimore to validate a scientific study using the lives of its firefighters.

When Dr. Bruce advocated performing this experiment on Wyoming Game Wardens before the jury in *E.E.O.C. v. Wyoming*, No. C 80-0336 (D. Wyo. Nov. 18, 1983), on remand from this Court, his testimony was rejected, and that of Drs. Lind and Antlitz, who also testified for the respondents below, was credited. When Dr. Fox testified before the District Court in *E.E.O.C. v. Commonwealth of Pennsylvania*, 596 F. Supp. 1333, appeal docketed, No. 84-5743 (3rd Cir. Nov. 6, 1984), the Court rejected his testimony that age was not a BFOQ for Pennsylvania State Police Officers. When Drs. Lind and Antlitz testified in Massachusetts concerning age as a BFOQ for law enforcement personnel, their position was adopted by the First Circuit, *Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir. 1984), cert. denied, ___ U.S. ___, 53 U.S.L.W. 403 (1984).

population as a case finding device, but it may provide a useful indication of coronary disease prevalence in epidemiological studies of middle-aged men.

Ibid., p. 10.

The testing process itself poses a significant threat to firefighters. For testing to have any relevance at all, it must approximate the conditions to which a firefighter is exposed. Thus a strenuous occupation requires a strenuous test. One of the subdivisions to which plaintiffs' witness pointed as an example of a fire department which tested its employees was Alexandria, Virginia. After the district court trial in this case, Alexandria was compelled to cease testing firefighters after the tragic death of 39 year old firefighter just a few minutes after completing the test. The Barnard study, revealed that of 90 firefighters tested, one died of a myocardial infarction two days after having a normal resting ECG. Another firefighter, age 47, had a normal ECG during the stress test, and then suffered a myocardial infarction while showering 20 minutes after exercise. Barnard, et al., *Near-Maximal ECG Stress Testing and Coronary Artery Disease Risk Factor Analysis in Los Angeles City Firefighters*, J. Occ. Med., Vol. 17, No. 11, p. 693 at p. 694 (R. 921).

In most occupations, testing may adequately predict the ability of a given individual to perform a job. In the case of firefighting, the only reasonable test is the job itself (R. 932, 934). The rigors of moving a 117 pound duffle bag filled with Sakrete on a pleasant summer day (R. 391-3) do not weigh in extreme heat and humidity, or extreme cold, all significant stressors to a firefighter. Nor does such a test take into account the psychological stresses which exist in the fire ground when that 117 pound "object" is a mother who is screaming for the "subject" to rescue her infants from a blazing building two floors above. Furthermore, the test does not cope with errors in judgment which a firefighter might make, such as attempting a rescue or

"overhauling" without the use of protective air masks. Even with the strictest of discipline, firefighters are liable to get a "belly-full of smoke." If this is not laboratory air, but combustion products, including deadly carbon monoxide, the result will be more profound than a failing grade.

CONCLUSION

Baltimore urges this Court to find that the comparable Federal statute requiring retirement for Federal firefighters is a reasonable standard against which to measure Baltimore's retirement practices.

If this Court determines that the only standard is the BFOQ itself, Baltimore urges that this Court adopt the construction in *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974) and *Murnane v. American Air Lines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), wherein the employer must show only a minimal increase in the risk of harm for occupations upon which the public safety depends.

Even the *Tamiami* test, read in the context of the case, requires only that an employer's actions have a reasonable basis in fact. Any test which ignores the reasonableness of an employer's actions has no basis in the legislative history of the BFOQ, nor is it warranted by the nature of age discrimination.

For the foregoing reasons, the Circuit Court should be affirmed.

Respectfully submitted,

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April, 1985

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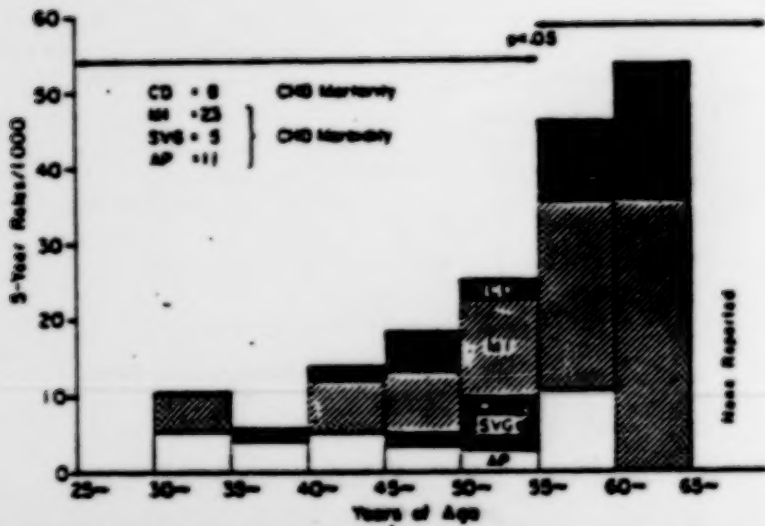
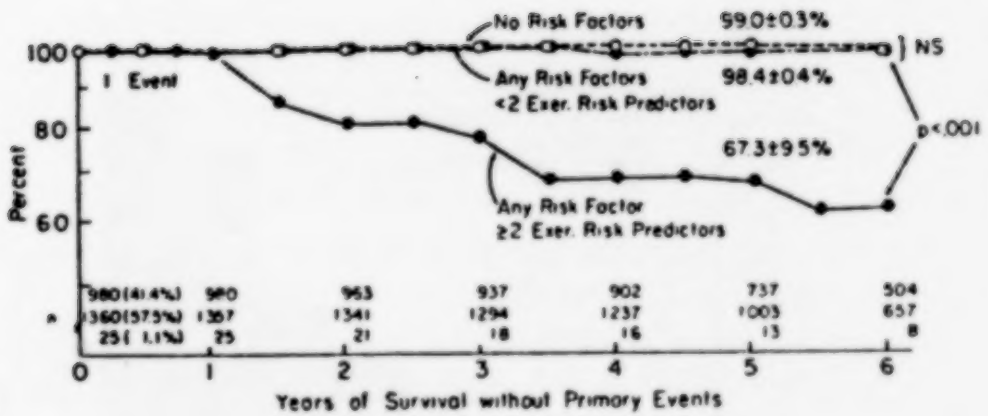


FIGURE 2. Five year rates of coronary heart disease events/1,000 men according to age at initial examination. There were no events in the small groups of persons 25 to 29 years of age and 65 to 69 years of age. AP = angina pectoris; CD = cardiac death; CHD = coronary heart disease; MI = myocardial infarction; p = probability; SVG = saphenous vein bypass grafting procedure.

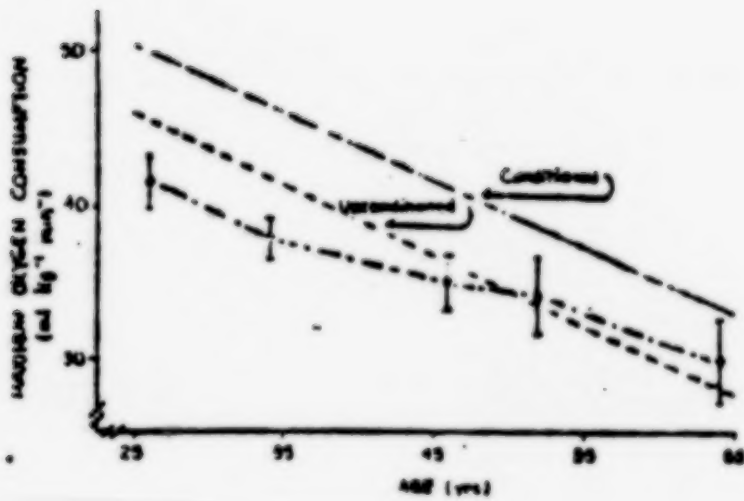
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In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, ET AL., PETITIONERS

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-518

ROBERT W. JOHNSON, ET AL., PETITIONERS

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

No. 84-710

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, ET AL.

*ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

**REPLY BRIEF FOR THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION**

1. In light of respondents' submission, it seems useful to reiterate the holding of the court of appeals and the issue that has been presented to this Court for review. Relying on a civil service statute that addresses retirement of federal firefighters (5 U.S.C. 8335(b)), the court of appeals held that Congress has established age 55 as a bona fide occupational qualification (BFOQ) for state and local firefighters — *as a matter of law* (Pet. App. 6a-8a). This means that

employers may require their firefighters to retire at age 55 without having to present a scintilla of evidence that such a retirement policy is necessary to the operation of the fire-fighting department. The question here is whether the federal statutory scheme in fact establishes such a *per se* BFOQ, which seems to promote age discrimination rather than limit it. That question is purely one of congressional intent.

Accordingly, it must be said that most of respondents' brief is quite beside the point. Respondents make little effort to defend the holding of the court of appeals. Instead, they devote the bulk of their submission (Resp. Br. 16-48) to advancing particular evidence designed to show that mandatory retirement for Baltimore firefighters is good policy and allegedly necessary to the operation of the Baltimore fire department. While this particularized submission is flawed in its own right (see, *e.g.*, note 6, *infra*), its overriding deficiency is that it is completely irrelevant to the question of whether Congress intended to allow mandatory retirement at age 55 of all state and local firefighters in the absence of any evidence regarding the need for such a policy.

What is most remarkable — and illuminating — about respondents' brief is that, in a case that is solely one of statutory interpretation, respondents barely address the language, structure, and pertinent legislative history of the statutes in question. As explained in our opening brief and unrebutted by respondents, the ADEA itself quite clearly demonstrates that age 55 has not been established as a *per se* BFOQ for state and local firefighters. In the absence of statutory guidance to the contrary, the BFOQ exception is one that requires a factual showing of the necessity for an age limit. See EEOC Br. 17-21. Despite the presence of several explicit exceptions in the ADEA, Congress has not specified an exception for firefighters. And implying such an exception would fly in the face of both the consistent

administrative interpretation of the ADEA and its overriding purpose to eliminate age discrimination. See EEOC Br. 24-27. Moreover, this Court has recognized (*EEOC v. Wyoming*, 460 U.S. 226, 243 n.17 (1982); see EEOC Br. 31-32) and the legislative history conclusively demonstrates (see *id.* at. 28-31) that the retention of a statutory provision concerning retirement of federal firefighters — the sole basis for the decision of the court of appeals — was not intended to establish age 55 as a BFOQ for state and local firefighters; indeed, the sponsors specifically stated that this did not reflect approval of mandatory retirement.

2. a. Respondents contend (Br. 4-12) that the 1967 legislative history of the original ADEA supports their contention that age is a BFOQ for firefighters. It is undisputed, of course, that Congress enacted a BFOQ exception; its purpose was to provide a safety valve so that employers would not be absolutely precluded from using age as a basis for making employment decisions where necessary. And the legislative history gives some indication that Congress recognized that hazardous occupations, such as firefighting, were ones where such an exception might be applied. But there can be no doubt that Congress did not establish an across-the-board exception from the ADEA for these occupations. Nothing in the statute can support such an interpretation, and nothing in the legislative history suggests that such was Congress's intent. Rather, Congress plainly contemplated that, even in hazardous occupations, a factual showing of necessity would be required to establish a BFOQ (see EEOC Br. 17-21). And Congress has continued to decline to enact an exception to the ADEA for firefighters and law enforcement officers (see *id.* at 25 n.19). Thus, the ADEA provides no support for the contention that mandatory retirement for firefighters may be justified without any evidentiary showing.

b. Nor does 5 U.S.C. 8335(b) establish age as a BFOQ for state and local firefighters. When the statute was passed, Congress made no findings that would support recognition of age as a BFOQ (see EEOC Br. 36-41), and when the statute was retained in 1978 Congress specifically disclaimed any approval of the mandatory retirement provisions (*id.* at 28-31). Congress's failure in the intervening period to bring the treatment of federal firefighters into conformity with the principles of the ADEA may be ascribable to any of several reasons: (1) inertia and delays in the legislative process; (2) a decision to treat federal employees differently from state employees; or (3) "the ebbs and flows of political decisionmaking" (*EEOC v. Wyoming*, 460 U.S. at 243 n.17).¹ What is clear, however, is that Congress's failure to change the treatment of relatively few federal employees was not intended to remove from the purview of the ADEA the considerably larger number of state and local firefighters.²

c. In the absence of any statutory support for their position, respondents advance several policy reasons to justify allowing them to retire their employees involuntarily at age 55 without any evidentiary showing that it is necessary to the effective operation of the fire department. They argue that mandatory retirement contributes to the predictability

¹Legislation recently has been introduced in the House to eliminate mandatory retirement for all federal employees, including firefighters, not presently covered by the ADEA. H.R. 1710, 99th Cong., 1st Sess. (introduced Mar. 25, 1985).

²We are informed by the Office of Personnel Management that in 1984, there were about 11,000 civilian federal firefighters. By contrast, in 1983 there were about 310,000 paid state and local firefighters. See Bureau of the Census, U.S. Dep't of Commerce, *Public Employment Report 3*, Table 3 (1983).

of Baltimore's financial planning (Resp. Br. 19-20),³ that it promotes the safety of the firefighters themselves (*id.* at 17-18, 47-48), that application of the ADEA will lead to more disability payments than contemplated (*id.* at 19), that state and local governments should not be treated differently from the federal government (*id.* at 35-36), and that the ADEA should be directed only at "arbitrary" age discrimination, not at employment practices that are "reasonable" (*id.* at 9-12). The amici supporting respondents urge that application of the ADEA leads to litigation and the possibility of disparate results in neighboring communities (Vt. Br. 5-13; N.Y. Br. 15). Without debating the merits of these various policy arguments,⁴ the short answer is that they are properly addressed to Congress. The ADEA has been amended before, and Congress is quite capable of excepting state and local firefighters from its provisions if it is persuaded by these considerations.⁵

3. Respondents' primary submission is that the City of Baltimore has made the evidentiary showing necessary to establish age as a BFOQ for its firefighters. This argument was not passed upon by the court of appeals, and there is no reason for this Court to consider it. As a preliminary matter, respondents argue (Br. 28-33) that the district court

³This Court has already explained in some detail the reasons why it "cannot conclude from the nature of the ADEA that it will have either a direct or an obvious negative effect on state finances." *EEOC v. Wyoming*, 460 U.S. at 240-242.

⁴It must be remembered, however, that the overriding purpose of the ADEA is to eradicate age discrimination and to promote individualized employment decisions, not to encourage decision making on the basis of age by facilitating use of the BFOQ defense.

⁵Legislation to exempt state and local firefighters and law enforcement officers from the ADEA has been introduced in both the Senate (S. 698, 99th Cong., 1st Sess. (introduced Mar. 20, 1985)) and the House of Representatives (H.R. 1435, 99th Cong., 1st Sess. (introduced Mar. 6, 1985)).

erred in applying the BFOQ test set forth in *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976), which they characterize as "oppressively strict" (Resp. Br. 31). Because the court of appeals found it unnecessary to consider whether the evidence supported a BFOQ finding, it certainly did not address the question of the standard to be applied in assessing such evidence. The question of the correctness of the *Tamiami* test therefore is not presented in this case; as noted in our opening brief (at 19 n.13), in *Western Air Lines, Inc. v. Criswell*, No. 83-1545 (argued Jan. 14, 1985), the Court is considering the relevant standard for demonstrating a BFOQ. We note here only that the *Tamiami* test has been universally accepted by the courts of appeals, including the Fourth Circuit, and that Congress apparently has recognized that the *Tamiami* test sets forth the correct analysis for determining whether a BFOQ has been shown (see EEOC Br. 18-21).

By the same token, respondents' argument (Br. 33-48) that, regardless of the proper standard, the evidence presented in this case established age as a BFOQ for Baltimore's firefighters also was not reached by the court of appeals. The argument was unequivocally rejected, however, by the district court, which presided over the trial and heard the evidence. As summarized in our opening brief (at 6-8), the district court found that the evidence showed that Baltimore firefighters, including the individual plaintiffs, historically had served effectively beyond the age of 55 (Pet. App. 40a-42a) and that there were practical ways to deal on an individualized basis with removing employees whose medical condition had deteriorated (*id.* at 42a-49a). And the court of appeals noted that, if it had not ruled that evidence of the necessity for the age limit was irrelevant, it "might well [have been] persuaded by the thorough, impeccably reasoned opinion" of the district court (*id.* at 8a). The place to consider whether the district court's factual findings are

clearly erroneous (see *Anderson v. City of Bessemer City*, No. 83-1623 (Mar. 19, 1985)), is in the court of appeals on remand.⁶

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1985

⁶It is noteworthy, however, that respondents' stated concern for the physical condition of its firefighters (Br. 33-48) apparently begins only when they reach age 55. The Chief of the Baltimore Fire Department testified that it has no physical fitness program (C.A. App. 786). And the record does not indicate that respondents take into account any of the recognized major risk factors for predicting heart disease, such as smoking, high blood pressure, and high cholesterol (see Resp. Br. 45 n.17; C.A. App. 428) in assessing when firefighters should be retired. Thus, under respondents' program, a 55-year-old firefighter in perfect physical condition is apparently deemed more of a threat to the safety of Baltimore's citizenry than a heavy-smoking, overweight 50-year-old firefighter with elevated blood pressure and cholesterol levels and a history of heart disease in his family. Moreover, respondents' assertion that retaining firefighters beyond age 55 is a threat to public safety is further belied by the fact that respondents' own plan allows all lieutenants, who "perform at fires the same duties as firefighters of lesser rank" (Pet. App. 39a n.9), to work until age 65.